# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1902.

No. [illegible] 209.

---

THE STATE OF TENNESSEE ON THE RELATION OF G. L. MALONEY ET AL., PLAINTIFFS IN ERROR,

*vs.*

STEPHEN P. CONDON, T. T. McMILLAN, JAMES RICH, AND H. C. ANDERSON.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

---

FILED DECEMBER 10, 1901.

(18,349.)

(18,349.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1901.

No. 496.

---

THE STATE OF TENNESSEE ON THE RELATION OF G. L. MALONEY ET AL., PLAINTIFFS IN ERROR,

*vs.*

STEPHEN P. CONDON, T. T. McMILLAN, JAMES RICH, AND H. C. ANDERSON.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

---

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 2 | 1 |
| Transcript from the chancery court of Knox county | 1 | 1 |
| Prosecution bond | 1 | 1 |
| Original bill | 1 | 2 |
| Subpœna and return | 6 | 5 |
| Order overruling motion for injunction | 6 | 5 |
| Order allowing complainants to strike out clause and amend bill | 7 | 6 |
| Demurrer | 8 | 6 |
| Final decree | 9 | 7 |
| Entries from rule docket | 10 | 8 |
| Appeal bond | 11 | 8 |
| Bill of costs | 11 | 9 |
| Certificate of clerk and master | 12 | 9 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 3, 1902.

| | Original. | Print |
|---|---|---|
| Transcript from court of chancery appeals | 13 | 10 |
| Assignment of errors and brief for complainants | 13 | 10 |
| Reply for defendants Condon *et al* | 23 | 16 |
| Opinion | 30 | 20 |
| Decree | 33 | 22 |
| Assignment of errors of relators | 34 | 23 |
| Reply brief | 36 | 24 |
| Decree | 37 | 24 |
| Assignment of errors for Supreme Court of the United States | 38 | 25 |
| Citation and service | 39 | 26 |
| Writ of error | 40 | 26 |
| Bond | 42 | 27 |
| Costs of clerk of supreme court of Tennessee | 43 | 28 |
| Certificate of clerk of supreme court of Tennessee | 43 | 28 |

a Chancery Cause, 3rd Circuit, Knox County.

Parties:

STATE OF TENNESSEE on the Relation of G. L. MALONEY *et al.*, Complainants,
*vs.*
STEPHEN P. CONDON ET AL., Defendants. } No. 15.

Solicitors:

Green & Shields and Pickle & Turner, solicitors for compl'ts.
C. T. Cates, Jr., and J. W. Caldwell, solicitors for def'ts.

Filed April 25, 1901.

ALEX. McMILLAN, *Clerk.*

Appeal bon-, $250.00, Green & Shields, & Pickle & Turner, securities.

1 Transcript of the record in the case of State on relation of G. L. Maloney and others *vs.* S. P. Condon *et al.*, in the chancery court of Knox county, Tennessee, the same being cause No. 8058 on the rule docket of said court.

*Prosecution Bond.*

Filed March 11, 1901. J. F. Chumbley, C. & M.

STATE OF TENNESSEE:

Know all men by these presents: That we, State of Tennessee, on relation of G. L. Maloney *et al.*, and Green and Shields, security are held and firmly bound unto Stephen P. Condon *et al.*, in the penal sum of two hundred and fifty dollars, to be void on condition that said principal obligors shall prosecute with effect a suit which they are about to commence in said court against said obligee, or pay all costs and damages incident on failure thereof, or which may be adjudged against them.

March 11th, 1901.

G. L. MALONEY ET AL., [SEAL.]
By GREEN, *Att'y.*
GREEN AND SHIELDS, *Sec.* [SEAL.]

*Original Bill.*

Filed March 11th, 1901. J. F. Chumbley, C. & M.

THE STATE OF TENNESSEE on the Relation of T. A. RAMBO and G. L. Maloney, G. H. St-ong, S. L. England, Sam. Vance, J. F. C. Harrell, and R. L. Peters, Relators, all Citizens and Residents of Knox County, Tennessee,

*against*

STEPHEN P. CONDON, T. T. MCMILLAN, and JAMES RICH and H. C. Anderson, All Residents of Knox County, Tennessee

To the Hon. Joseph W. Sneed, circuit judge holding the chancery court at Knoxville, Tennessee:

2 The State of Tennessee, on the information of the said relators, represents to the court that at the January term, 1898, G. H. Strong and T. A. Rambo, were duly and legally elected by the county court of Knox county, Tennessee, members of the pike commission of Knox county, for the term of four years, which would make their terms of office expire in January, 1902, and G. L. Maloney, who is the judge of Knox county, Tennessee, is by operation of the law, *ex officio* chairman of said commission.

The said Sam. Vance and J. F. C. Harrell were duly elected members of the said workhouse commission by the said county court of Knox county, Tennessee, at its January term, 1901, which would make their terms of office expire in 1903. The said S. L. England and I. N. White were duly elected workhouse commissioners of Knox county, Tennessee, at its January term, 1900, which would make their terms of office expire in 1902, and the said G. L. Maloney as judge of the county is *ex officio* chairman of the said commission. The said R. L. Peters was elected superintendent of the workhouse in January, 1898, which would make his term of office expire in January, 1902. All of said officers were duly and legally elected and inducted into their respective offices and assumed the duties thereof, and up to the time of the qualification of defendants, to wit, on March 2, 1901, continued to perform the duties, and exercise the functions and receive the emoluments pertaining to said offices.

II.

The State of Tennessee, on the information of the said relators, now further show to the court that on Feb. 8, 1901, the General Assembly of the State of Tennessee passed an act, which was approved by the governor, and went into effect on the same day, with the following caption, viz:

"An act to create a board of public road commissioners, to regulate the laying out and working of public roads in this State,
3 in counties having a population of not less than 70,000 and not more than 90,000, under the Federal census of the year 1900, or any subsequent Federal census, and to provide a method for the management and control of county workhouses, in counties coming under the provision- of this act."

III.

The State of Tennessee, on the information of said relators, now further represents to the court that under and in pursuance of said act, the Hon. Benton McMillin, governor of the State of Tennessee, on the 16th day of February, 1901, appointed the defendants, Stephen P. Condon, James Rich and T. T. McMillan, as the board of public road commissioners. The said Stephen P. Condon was appointed superintendent of public roads, and the other two defendants were appointed associate members of the said road commission, and the said Benton McMillin has issued to the defendants commissions as such public road commissioners. The said defendants, under and by virtue of their said appointments and commissions, aforesaid, gave bond and qualified on March 2nd, 1901, and are now attempting to perform the duties of the said offices. While the act in question referred to in the second paragraph of this bill does not in term- repeal the laws under which the said pike commissioners, the said workhouse commission and the said R. L. Peters were elected and held their respective offices aforesaid, still the defendants are assuming that it has been repealed, and they have in fact ousted said commissioners and superintendent from their respective positions, and have deprived them of their privileges and powers. The defendant, H. C. Anderson, has, as your orators are informed, been elected by the commissioners as manager of the workhouse.

Your orators, who are all citizens of Knox county, Tennessee, respectfully represent and charge that the act of February 8th, 1901, under which the defendants are claiming their offices aforesaid, and are assuming to perform the duties thereof, is in plain violation of the constitution of the State of Tennessee, and that said act
4 is illegal, null and void, and is not effective to deprive the said parties of the several offices aforesaid, to which they were regularly elected or to the rights, powers, privileges emoluments thereof.

Your relators further charge that in fact and in law the said pike commissioners, workhouse commissioners and said superintendent of the workhouse above named are the only real, true, and legal officers, and that they have been unlawfully and wrongfully ousted and ejected by the defendants from their said offices, and that the said defendants are unlawfully holding and exercising said offices of public road commissioners and superintendent of roads and associate members, and that they are usurpers of said offices.

IV.

The premises considered, the prayer is,

1st. That the defendants, Stephen P. Condon, James Rich, and T. T. McMillan, and H. C. Anderson, named in the caption, may be made such by due process, and that they may be required to answer the allegations of this bill fully and specifically on their oaths.

2nd. That the said defendants may be enjoined from holding the said offices of public road commissioners or superintendent of public roads or associate members of said road commission, or manager of the workhouse, or from exercising any of the powers and rights which the said act of February 8th, 1901, attempts to confer upon them, and that they may be enjoined from receiving any of the emoluments appertaining to the said offices under and by virtue of the said unconstitutional and void act, and that upon final hearing said injunction may be made perpetual.

3rd. That the said defendants may be required to execute a bond in a sufficient amount required by law to indemnify the said ejected officers against all loss or damage by reason of their being deprived of their offices aforesaid, and to hold them harmless by reason of their having been ousted from their said offices.

4th. That upon final hearing a decree may be rendered declaring that the said act of February 8th, 1901, is unconstitutional, null, and void, and that the same confers no right upon the defendants, and that the defendants are not entitled to exercise any of the powers and privileges therein contained, or to enjoy any of the rights and emoluments therein given to them, and that they be required to surrender same and turn over all the powers, property and privileges thereof to the rightful owners aforesaid.

5th. For general relief.

This is the first application for an injunction in this case.

G. McHENDERSON,
*Att'y Gen. 2nd Judicial Circuit & Knox and Sevier Counties, in the State of Tennessee.*

PICKLE AND TURNER,
GREEN AND SHILEDS, *Sol's.*

STATE OF TENNESSEE, }
*Knox County.* }

Personally appeared before me, the undersigned authority, Sam. Vance, Geo. L. Maloney, S. L. England, R. L. Peters, and T. A. Rambo, relators in the foregoing bill, with whom I am personally acquainted, and made oath in due form of law that the statements contained in the said bill as of their own knowledge are true, and those made on information and belief they believe to be true.

G. H. STRONG.
SAM. VANCE*M.*
S. L. ENGLAND.
T. A. RAMBO.
G. L. MALONEY.
R. L. PETER.

Sworn to and subscribed before me this March 15th, 1901.

J. F. CHUMBLEY, *C. & M.*
W. K. ANDERSON,
*Notary Public.*

Endorsed.

We agree to hold the State of Tennessee harmless from all costs of this suit, and we hereby acknowledge ourselves liable for
6 the costs thereof in case they are taxed against the complainants.

This March 5th, 1901.

GREEN AND SHIELDS.

*Subpœna to Answer.*

Issued 11th Day of March, 1901.

STATE OF TENNESSEE:

Chancery Court at Knoxville.

Summon Stephen P. Condon, T. T. McMillan, James Rich and H. C. Anderson to appear before the chancery court at Knoxville, on or before the third Monday in March, 1901, to answer the original bill which the State of Tennessee on the relation of G. L. Maloney *et al.* has filed in said court against them, and have you then and there this writ.

Witness J. F. Chumbley, clerk & master of our said court, at office in Knoxville, this 11th day of March, 1901.

J. F. CHUMBLEY, *C. & M.*

*Notice.*

To the above-named defendants:

You are hereby notified that you are required to make defense in this case on or before the third Monday of March, 1901, or judgment *pro confesso* will be entered against you.

J. F. CHUMBLEY, *C. & M.*

Endorsed.

Came to hand 11th day of March, 1901. Executed as commanded and left a copy of the bill with T. T. McMillan and a copy of this subpœna to answer with each adult defendant.

This 12th day of March, 1901.

J. W. FOX, *Sheriff,*
By M. W. HARDIN, *D. Sheriff.*

*Order Overruling Motion for Injunction.*

THURSDAY, *March 21st*, 1901.

Court met pursuant to adjournment, present and presiding
7 the Honorable Jos. W. Snedd, chancellor, &c., record of yesterday read, approved and signed, and the following additional proceedings were had, to wit:

STATE OF TENNESSEE on Relation of G. L. MALONEY ET AL.
*vs.*
STEPHEN P. CONDON ET AL.

This cause was heard before the Hon. Joseph W. Sneed, chancellor, this March 21st, 1901, upon the application of the complainants for an injunction restraining the defendants from holding and exercising the offices now occupied by them and from collecting the emoluments and salaries attaching thereto unless they shall give a bond of indemnity securing the pike commissioners, the workhouse commissioners and the superintendent of the workhouse against all loss or damage by reason of their having been wrongfully ousted from their said offices and deprived of the salaries and emoluments thereof, which motion having been argued by counsel and fully considered by the court, — disallowed, to which action of the court the complainants excepts.

*Order Allowing Complainant to Strike Out Clause and Amend Bill.*

SATURDAY, *March 23rd*, 1901.

Court met pursuant to adjournment, present and presiding the Honorable Jos. W. Sneed, chancellor, etc., record of yesterday read approved and signed, and the following additional proceedings were had, to wit:

STATE OF TENNESSEE on Relation of GEO. L. MALONEY ET AL.
*vs.*
STEPHEN P. CONDON ET AL.

In this cause on this March 23rd, 1901, the complainants come and move the court to be allowed to amend their bill by dismissing and striking out the following clause in the fourth paragraph thereof,
8 namely: "That the said defendants may be required to execute bond in a sufficient amount conditioned as required by law to indemnify the said ejected officers from loss or damage by reason of their being deprived of their offices aforesaid, and to hold them harmless by reason of their having ousted them from their said offices," which motion the court is pleased to allow, and said clause is stricken out and the bill is amended accordingly.

*Demurrer.*

Filed March 29th, 1901. J. F. Chumbley, C. & M.

THE STATE OF TENNESSEE upon the Relation of G. L. Maloney ET AL.
*vs.*
STEPHEN P. CONDON ET AL.
# 8058.

The defendants, Stephen P. Condon, James Rich, T. T. McMillan, and H. C. Anderson, demur to the bill filed against them in this cause, upon the following grounds:

First. The only specific allegation in the bill is that the act of

General Assembly of February 8th, 1901, which is attacked by the bill is unconstitutional, fails to repeal by express terms the acts of the assembly under which relators assert that they are entitled to the offices formerly held by them and named in their bill: Whereas defendants say that said act of February 8th, 1901, is a direct and positive act of law, which lays down definitely a new rule covering the subjects to which said act applies; that it is wholly inconsistent with, and in conflict with the act or acts on which complainants, relators, rely; so that said act of February 8th, 1901, and the act or acts on which said relators rely cannot exist together, and therefore the necessary result of passing said act of February 8th, 1901, was and is to repeal the act or acts relied upon by relators in all counties to which said act of February 8th, 1901, applies, and no express repeal was necessary or proper, the repeal by implication being sufficient.

9 Second. In said bill is a misjoinder of parties, in that it joins as complainants the pike commissioners of Knox county, to wit: G. L. Maloney, G. H. Strong, and T. A. Rambo, and the workhouse commissioners, to wit: Sam. Vance, G. L. Maloney, J. F. C. Harrell, S. L. England, and I. N. White, and also R. L. Peters, superintendent of the workhouse, as they were severally designated under the last repeal by the act of February 8th, 1901: Whereas there is no such legal connection between said three parties, nor such a community of interest among them that they are entitled to maintain this bill, nor is there such connection as to enable any two of them to maintain it, nor that others may maintain it for them.

Third. The bill is multifarious in that it joins three separate and independent causes of action in one *suit*, that is:

(1.) The alleged cause of action in favor of complainants, G. L. Maloney, G. H. Strong, and T. A. Rambo, styling themselves as pike commissioners of Knox county.

(2.) The alleged cause of action in favor of complainants G. L. Maloney, Sam. Vance, J. F. C. Harrell, S. L. England, and I. N. White, styling themselves as the workhouse commissioners of Knox county.

(3.) The alleged cause of action in favor of R. L. Peters, styling himself as superintendent of the workhouse of Knox county.

Fourth. Defendants say that they are fully protected in the enjoyment of their offices by said act of February 8th, 1901, which is attacked in the bill, but which is a valid and constitutional act of the General Assembly of the State of Tennessee, duly passed, duly approved, and now in effect.

Wherefore these demurrants pray the judgment of the court.

CHAS. T. CATES, JR.,
J. W. CALDWELL, *Solicitors.*

*Final Decree.*

SATURDAY, *March 30th*, 1901.

10 Court met pursuant to adjournment, present and presiding the Honorable Jos. W. Sneed, chancellor, &c., record of yes-

terday read, approved and signed, and the following additional proceedings were had, to wit:

THE STATE OF TENNESSEE on Relation of G. L. MALONEY
vs.
STEPHEN P. CONDON ET AL.

This cause was heard this the 30th day of March, 1901, before the Honorable Jos. W. Sneed, judge &c., holding the chancery court of Knoxville, Tennessee, upon the bill of complainants and the demurrer of the defendants thereto, and argument of counsel having been heard, the court is of opinion that the said demurrer of defendants is well taken, and should be sustained, on all the grounds therein set out, and doth so order and decree.

It is therefore ordered, adjudged and decreed that the bill of complainants filed in this cause be, and the same is hereby dismissed, and the complainants, relators, and Green and Shields the sureties on their prosecution bond, pay all the costs of the cause for which execution is awarded.

From the foregoing decree complainants pray an appeal to the next term of the supreme court, to be held at Knoxville on the second Monday in September, 1901, which is granted upon their giving an appeal bond as required by law.

*Entries from Rule Docket.*

| | | |
|---|---|---|
| 1901, March | 11th. | Bill filed, sworn to before C. & M. |
| " | " | Pros. bond, Green and Shields, sec'ty. |
| " | " | Copy bill (1600 w'ds) sub. to ans., 4 copies issued to Knox county, all def'ts. |
| " | 18. | Sub to ans. returned, endorsed, executed as commanded, March 12, 1901, M. W. Hardin, D. S. 4 def'ts. |
| " | 21. | Order overruling motion for injunction, 38, p. 33. |
| " | 22. | Order allowing compl'ts to amend bill 38, p. 69. |
| " | 29. | Demurrer to bill as amended, filed. |

11

| | | |
|---|---|---|
| 1901, March | 30. | Final decree sustaining demurrer and dismissing bill and appeal. |
| " | " | Bond of compl'ts for appeal with Green & Shields |
| " | " | Pickle and Turner, securities filed. |

*Appeal Bond.*

Filed 30 Day of March, 1901. J. F. Chumbley, C. & M.

STATE OF TENNESSEE:

Chancery Court at Knoxville.

We, G. L. Maloney *et al.* Green and Shields, Pickle and Turner, acknowledge ourselves indebted to S. P. Condon, *et al.* in the penal

sum of two hundred and fifty dollars, for the payment of which we bind ourselves, our heirs and personal representatives jointly and severally, by these presents, but to be void if the said G. L. Maloney *et al.* shall effectually prosecute their appeal taken to the supreme court of Tennessee, to be held at the court-house in Knoxville, on the second Monday of September next, from the decree rendered against them in the chancery court at Knoxville, on the 30th day of March, 1901, in the case of State on the relation of G. L. Maloney, *et al.*, *vs.* Stephen P. Condon, *et al.*, in said court or failing therein, shall pay the amount adjudged against them in said decree, with interest and damages and all costs and also satisfy the decree that may be rendered against them in the supreme court in the premises.

Witness our hands ans seals the 30th day of March 1901.

G. L. MALONEY ET AL. [SEAL.]
GREEN & SHIELDS. [SEAL.]
PICKLE & TURNER. [SEAL.]

*Bill of Costs.*

| | | |
|---|---|---|
| State tax | | 2.50 |
| County tax | | 2.25 |
| 12 | C. & M. J. F. Chumbley, filing bill, 25; aff't 25; pros. bond 75; copy bill, 160; sub. to ans. 75; copies, 1.00; 4 dkts. 40; 2 orders 50; 3 rules, 30; entering decree, 75; taxing cost 50 | 7.05 |
| Officer, M. W. Hardin, summoning 4 defendants | | 4.00 |
| | | $15.80 |

March 30, 1901.—Final decree and appeal, 38—p. 129.

*Clerk's Certificate.*

STATE OF TENNESSEE, }
*Knox County.* }

I, J. F. Chumbley, clerk & master of the chancery court of Knoxville, do hereby certify that the above and foregoing is a full, true and perfect transcript of the record and the bill of costs in the above-entitled cause as the same appears of record and on file in my office.

Given under my hand and official seal at office, in Knoxville, Tennessee, this April 25, 1901.

J. F. CHUMBLEY, *C. & M.*,
By —— ——, *D. C. & M.*

C. F. Chumbley, appeal bond 75; transcript 4800 w'ds 4.80; seal 50; $6.05

13 In the Court of Chancery Appeals at Knoxville, April Term, 1901.

THE STATE *ex Rel.* —— ——
*vs.*
S. P. CONDON ET AL. } Chancery Cause No. 15, Knox County.

Filed May 3, 1901. Alex. McMillan, Clerk.

*Assignment of Errors and Brief for the Complainant.*

Statement of the case.

This bill is brought under section 5165, *et seq.*, Shannon's Code, to test the defendants' right to the office of supt. of public roads, and road commissioners of Knox county, under the act of Feb. 8, 1901. It is brought by the State of Tennessee upon the relation of seven individuals. It alleges that the act under which the defendants claim said offices is unconstitutional and void, that the defendants were appointed to said offices by the governor, and that said appointment is void, that they have usurped the powers and offices of the pike commissioners and the workhouse commissioners and supt. of the workhouse of Knox county.

It further alleges that certain of the relators are members of the workhouse commission, certain other- members of the pike commission, and another, supt. of the workhouse of Knox county, who have been ousted from their offices by the defendants. Trans. pp. 1–5.

The defendants demurred to said bill, assigning four grounds of demurrer.

The first and fourth are to the effect that said act of Feb. 8, 1901, is valid and constitutional, and the appointment of the defendants to said offices is valid, and that they are therefore entitled to hold said offices.

The second and third grounds of demurrer are to the effect that there is a misjoinder of parties, and that the bill is multi-
14 farious, in that it joins, as complainants, the commissioners of the workhouse and commissioners of turnpikes, and the supt. of workhouses, and seeks to have declared their several rights to said offices. Tr. pp. 8–10.

The chancellor sustained this demurrer and dismissed the complainants' bill. Tr. p. 10. The complainants appealed and now comes by its solicitors and assigns errors as follows:

The chancellor erred in sustaining said demurrer and dismissing said bill, and taxing the relators with the costs. He should have overruled said demurrer and held the defendants to answer.

The chancellor was clearly in error in sustaining the second and third grounds of demurrer, on the ground of misjoinder of parties and multifariousness.

This is not the suit of the relators, but the suit of the State of Tennessee. It makes no difference how many relators appear in the case. It does not affect the unity of the State's suit. They simply assume joint liability for the costs. There can be no multi-

fariousness in this bill because it is directed to but one issue, that is to contest the validity of the act in question, and the right of the defendants to the offices created by that act. Those offices are not only created by the same act, but constitute in effect, one and the same office although filled by three individuals, to wit: A board of public road commissioners, one of whom is designated as supt. of public roads. The declaration of the right of the relators to the offices superceded and usurped by the defendants is a mere incident to the main purpose of the bill, and is sought in direct pursuance of authority of the statutes.

It is sufficient to quote here such portions of the code as are applicable to this question.

Sec. 5165 Shannon's Code, provides an action lies under the provisions of this chapter in the name of the State against the person or corporation offending in the following cases:

1. When any person unlawfully holds or exercises any public office or franchise within this State. * * *

15 Sec. 5167 provides, the suit is brought (by bill) in equity filed either in the circuit or chancery court of the county or district in which the office is usurped or held.

Sec. 5168. The suit is brought by the attorney general for the district or county when directed so to do by the General Assembly or by the governor and attorney general of the State concurring.

Sec. 5169. It is also brought on the information of any person, upon such person giving security for the costs of the proceeding, to be approved by the clerk of the court in which the bill is filed.

Sec. 5170. When the suit is brought on the relation of a private individual, it shall be so stated in the bill, and proceedings and such individual is responsible for costs in case they are not adjudged against the defendant.

Sec. 5175. Whenever the action is brought against a person for usurping an office, in addition to the other allegations, the name of the person rightfully entitled to the office, with a statement of his right thereto may be added, and the trial should, if practicable, determine the right of the contesting parties.

Sec. 5184 provides, should the relator die, pending the action, the suit abates, unless by the second term thereafter, it is revived in the name of some person who, on application, and giving security for the costs, is substituted in the place of the deceased relator. If there are several relators, the suit abates only on the death of all.

This last section shows that the office of relator is merely to assume the responsibility for costs, and that it makes no difference how many relators join in the suit.

The chancellor erred in adjudging that said act of Feb. 8, 1901, was a valid and constitutional act, and that the appointment of the defendants to said offices by the governor was valid.

16 1. Said act violates art. II, sec. 8, of the Constitution, in that it enacts vicious class legislation, and also violates art. I, sec. 8, which provides that all valid legislation shall constitute the law of the land. Also in the same regard it violates art. 14, sec. 1, of the amendments to the Constitution of the United States, which

provides that, "—State shall make or enforce any law, which shall abridge the privileges or immunities of the U. S., nor shall any State deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction, the equal protection of its laws."

This act is not general, applicable to all counties in the State, but it is partial and limited in its operation to Knox county alone. Both by caption and body of the act, it applies to counties having not less than 70000 and not more than 90000 inhabitants by the Federal census. Knox county is the only county in the State coming within this provision. It further appears from the census of 1890 that Davidson and Shelby counties have population in excess of the maximum limit fixed in this act, and therefore can never come within its provisions, without depopulating. All other counties in the State are of less population than the maximum fixed by the act, and of course might come within its provisions by a sufficient increase in population.

The classification permissible under this section of the Constitution must be natural and reasonable, and not arbitrary and capricious. There is no reason appearing for the classification in this act. It would be utterly unreasonable to adopt a classification that would require a county to retrograde and depopulate in order to come within the provisions of this act. Otherwise an act might be validly passed which would be applicable to the county of the least population in the State, and exclude by its maximum limit all other counties, so that no other county could come within its provisions without reducing its population to the limit of the
17 least county in the State. The principle will be the same whether applicable to such county of the least population or any intermediate county, as is done in this act.

See in support of this contention:

Sutton *vs.* State, 12 Pickle, 696—the reasoning as well as the facts of this case, appearing in the body of the opinion, are directly in point. See pp. 706–'9.

Burkholtz *vs.* State, 16 Lea, 71.

Woodard *vs.* Bryan, 14 Lea, 520–'23.

Weaver *vs.* Davidson County, 20 Pickle, 328–'33, which is strongly in point.

Harbison *vs.* Iron Co., 19 Pick., 422.

Ragio *vs.* State, 2 Pickle, 272.

Strattons *vs.* Morrises, 5 Pickle, 499, 521–'23.

Memphis *vs.* Fisher, 9 Baxter, 239.

Pope *vs.* Phifer, 3 Heisk., 701–'5.

The last case at the page referred to in discussing the viciousness of such legislation, and the bad policy of it, is much in point in relation to this particular case.

Class legislation that is vicious cannot be justified or sustained in behalf of counties any more than in behalf of individuals.

Weaver *vs.* Davidson County, 20 Pick., 317–'28.

The legislature may suspend the operation of the general laws of the State, but when it does so, the suspension must be general. It cannot be made for individual cases or for particular localities. Cooley Const. Limitations, p. 490.

Woodard *vs.* Bryan, 14 Lea, 523.

This act is radical and revolutionary, and therefore is the more vicious when restricted in its operation to a single county in the State. The act in question is so clearly a suspension of the general law for the benefit or to the detriment of Knox county as to require no argument to establish the proposition.

18 To save space of quotation, we direct the court's especial attention to the court's language in 3 Heisk. 701–'3, and to the fact that this act deprives the county court of Knox county of its long-established jurisdiction over public roads. Shan. Code, sec. 6038, 1617, 1683, 95.

It likewise uproots the workhouse law as it heretofore existed and still exists in all other counties of the State.

Shannon's Code, sec. 7398 *et seq.*

And also the turnpike law of the State. Shan. Code, sec. 1781, *et seq.*

It likewise imposes by sec. 4, upon the property within the corporate limits of the city of Knoxville, a tax for macadam roads in the county, while the city itself can have no benefit whatever, in such tax. It is compelled to take care of its own streets and sidewalks, and by section 3 of this act, each civil district constitutes a road district, and by section 5, all taxes collected in any road district shall be taxed in that district alone, hence property within municipal corporations will be liable to this tax for the benefit alone of the particular civil district or districts in which the city is located, for the part of said district or districts not embraced within the limits of the city. This is contrary to the policy of all former road laws.

In its provisions for the disbursement of county funds, upon the mere certificate or application of the road commission (sec. 3), or upon the warrant of the county judge, issued without auditing the accounts, and on demand of this road commission (sec. —) it overturns the settled policy of our laws with regard to the appropriation and disbursement of county funds. Shan. Code, sec. 6015–'18 requires that all disbursements of such funds shall be made in pursuance of appropriations by the county court, upon application filed for at least a month before action. And by sec. 517–'18 it is

19 further required that the county judge shall first audit all claims for money against the county, and that no money shall be drawn out of the treasury of the county, except upon his warrant; nevertheless this commission is given the power to employ a superintendent and other employees of the workhouse, at their own discretion, fixing the amount of their compensation, and thus by their own act appropriating and paying out the funds of the county. It practically vests in them the power of taxation and appropriation

of public funds. These radical innovations upon a long-settled policy of our laws, applicable to these subjects, are restricted in their application of Knox county alone, and this, too, in the face of the fact that absolutely no reason can be assigned why this law should be limited to Knox county, and not made applicable to all the counties in the State.

"The power conferred upon county courts to tax cannot be, by any special or local law, taken from the justices as a county court, and conferred on local tribunals of particular counties, composed, even temporarily, of commissioners appointed by the governor. Taxation by the county court preserves the principle of taxation by the representatives of the tax-payers, which the other system infringes."

Pope *vs.* Phifer, 3 Heisk. 363.

2. This act also violates sec. 17 art. 2, of the constitution in that it contains both in its caption and body, two separate and distinct subjects of legislation, to wit: Roads and workhouses. It likewise provides in its body for public roads and also for pikes or macadam roads, the latter not being mentioned in the caption.

These subjects have always been recognized as separate and distinct by all previous legislation thereon, and there can be no necessary connection between roads and workhouses—and whatever kinship there may be between the public roads and pike or macadam roads, they have nevertheless, always been heretofore treated by the legislature as separate and distinct subjects.

20 In the Code of 1858, chap. 5, beginning with sec. 1182, was devoted to the subject of roads and ferries, while chap. 7 was devoted to the subject of turnpikes. This distinction has ever since been kept up. See Shan. Code, sec. 1617, chap. 4, *et seq.* and chap. 6, sec. 1749, *et seq.*

Under this general chap. on turnpikes, art. 3, has always been treated the subject of turnpikes or macadam roads owned by the counties.

As to workhouse laws, they are found in the Code of 1858 under title 7, chap. 1, art. 4, sec. 6256, *et seq.*, under the heading of "Houses of correction." Then follows the workhouse laws of 1875, chap. 83, and this was superceded by the act of 1891, chap. 123, which is still in force.

True, these workhouse laws made provision for the working of the convicts on public roads, under certain conditions, but has always been left to the discretion of the county courts as to whether they should maintain a workhouse at all, whereas the letting out, maintaining and working public roads has always been absolutely enjoined on the county authorities.

We respectfully submit that it contravenes the spirit of this article of the constitution which was expressly adopted to prevent the confusion of two or more subjects into one act of legislation.

This provision originated with the constitution of 1870 and at that time these subjects as treated by the codified laws of the State,

were separate and distinct, and must have been so contemplated by the convention adopting this provision of the constitution.

3. This act also violates sec. 17 of art. II of the constitution, which provides that no county office created by the legislature shall be filled otherwise, than by the people or the county court. This act by section 1 provides for the appointment by the governor of these road commissioners, and supt. of public roads, until the next regular election. These defendants are now claiming under
21 appointment of the governor, said offices, and are therefore not entitled under the foregoing section of the constitution to fill said offices.

Pope *vs.* Phifer, 3 Heish. 700.

In the case of State *ex rel.* Smiley *vs.* Glenn, 7 Heisk. 472, it was held that a county judge was not such a county officer as would forbid the filling of vacancy in the office, by appointment by the governor. This decision is rested upon the fact, that while the county judge is a county officer in one sense, he is likewise a judge, belonging to the judicial department of the State, that he exercises all the duties and functions of a judge, has concurrent jurisdiction with the circuit and chancery courts, may interchange with judges of other counties, etc., and therefore he is not such an officer as is contemplated by that provision of the constitution.

See 7 Heisk. pp. 486–'7.

So also the case of Cook *vs.* State, 6 Pick. 407–'14, holding that commissioners of registration are not county officers in the contemplation of that section of the constitution and therefore might be appointed by the governor. But it certainly cannot well be contended that the commissioners authorized by this act in question, are anything more than county officers. Their jurisdiction and powers are limited absolutely to the county. The subjects with which they deal under said act are local improvements, and the county workhouse, which cannot directly affect any other part of the State, except the county for which they are appointed. If they are not county officers in the sense of this provision of the constitution, it is hard to define any class of officers, that would fall within that provision of the constitution.

The fact that this act provides for the election of these commissioners at the next general election, does not relieve it in the slightest from this objection. There is no qualification, whatever, in this provision of the constitution. It is absolute and in as plain words as the English language affords, to wit, "No county offices created by the legislature shall be filled otherwise than by
22 the people or the county court."

It is a mere quibble of words to say that the appointment to a vacancy is not filling the office. Besides that, this provision of the constitution contemplates not only the election by the people but the action of the county court, and that the county court is the proper authority to fill such vacancies or partial terms, as may occur before the regular elections by the people. This provision evidences

the purpose of the constitutional convention to guarantee local self-government to the several counties of the State, which intention and provision is so openly and flagrantly violated by the enactment of this particular statute.

It takes away from the county court and the commissioners elected by said court, and commits to the control of the appointees of the governor, these objects of highways, turnpikes and workhouses, which are purely local in their nature and have always been regarded as subjects for local regulation and control. If this statute can be maintained, it will appear that the legislature can legitimately control, directly by its own enactments or indirectly by commissioners appointed by the governor all local affairs of any county or municipality, and our cherished idea of local self-government would necessarily have to be expanded to the idea of State government.

For the errors the decree of the chancellor should be reversed, and the cause remanded for further proceedings.

GREEN AND SHIELDS.
PICKLE AND TURNER.

23 THE STATE OF TENNESSEE upon the Relation of G. L. Maloney *et als.* *vs.* STEPHEN P. CONDON ET ALS. } From the Chancery Court of Knox County.

Filed Apr. 30, 1901. J. G. Stuart, D. C. Refiled Sept. 25, 1901. Alex. McMillan, Cl'k.

*Reply for the Defendants, Condon et als.*

"I."

The defendants accept the statement of the case made in the brief for complainants, reserving the right to show the facts more fully from the record.

"II."

We insist that both grounds of demurrer, based upon multifariousness, are good. We insist that this is not the suit of the State of Tennessee, but the suit of relators, and that the case is not directed solely to the one question of the validity of the act of the legislature, referred to in the pleadings and the right of defendants to hold the offices created by said act. It is true that defendants hold but one office, but the relators charge that in holding this one office they usurp two or three different offices to which the relators, as distinguished in the bill, are respectively entitled. While we insist that the act is good as a whole, and may not be disturbed by the courts, it is possible that at least it might be valid as respects one class of the complainants, and not as respects another class. For this and for other reasons we insist that the chancellor was right in holding the demurrer good upon the two grounds referred to.

"III."

We insist that the chancellor was right in holding the act of February 8, 1901, to be valid and constitutional in all respects. We deny that said act violated article XI, sec. 8 of the constitution, in that it is vicious class legislation or that it violates article
24 XIV, sec. 1 of the amendments to the Constitution of the United States by depriving any person of life, liberty or property, without due process of law, &c. We insist that the act is in all respects valid. In fixing the population limits at from 70000 to 90000 it has the support of long-established law in Tennessee.

Upon this point we submit first that every intendment is in favor of the constitutionality of the act of the legislature, and that every reasonable doubt must be solved in favor of the legislative action. Cole Mfg. Co. *vs.* Fall, 90 Tenn. 469.

All class legislation is not invalid. Class legislation which is natural and reasonable has uniformly been upheld by the supreme court of Tennessee, and by the Supreme Court of the United States. State *vs.* Brewing Co., 104 Tenn. 731.

That it is not unconstitutional to classify counties by legislation in such a way that certain counties cannot come within a certain class without a decrease of population has been clearly declared by the Supreme Court. Weaver *vs.* Davidson Co., 104 Tenn. 330.

The sole test of the validity of class legislation is reasonableness. Under the present act even by complainant's admission, every county in the State, except two, can by increase of population come within the provisions of this act. If half the counties were in the position of Davidson and Shelby counties, as stated in complainant's brief, that would not make the act unconstitutional, provided there was some reason for adopting such a classification; the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. 170 U. S. 294; State *vs.* Brewing Company, 104 Tenn. 732. "And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical and is not reviewable unless palpably arbitrary." State *vs.* Brewing Co., 104 Tenn., 732, 733, and authorities cited.

25 In the case now on trial, there is nothing to show that the classification is palpably arbitrary, and there can be no review unless it is palpably arbitrary.

The sole test is reasonableness; every intendment is in favor of reasonableness. Subject to the rule of reasonableness the discretion of the legislature to classify is practically unlimited.

It may be that the act is at present limited in operation to a single county, but every county of inferior population may acquire the necessary population, and it is by no means inconceivable that the counties of Shelby and Davidson might also come within its limits. But whether this be true or not, we insist that there is nothing to show that the classification is palpably arbitrary, and that the pre-

sumption in favor of the reasonableness of the legislative action must prevail.

Complainant endeavors to treat the present act as a suspension of the general laws of the State. We submit that there is nothing of the kind in the act. There are hundreds of such laws on the statute books of the State and they have been uniformly upheld.

The fact that the act is regarded by the complainants as radical and revolutionary is not to be considered in this case nor would the fact that it was actually radical and revolutionary. In a certain sense every repealing act is radical and revolutionary, but not in a sense objectionable to the law.

If it be conceded that the act in question deprives the county court of Knox of a long-established jurisdiction over public roads, the concession would be unimportant. The county court is the creature of the statute, having no rights except those conferred by statute, and none which cannot be taken away from it by statute. Railway Co. vs. Wilson, 89 Tenn. 600–601. If any right be in fact taken from the county court by this act it is merely the right to choose commissioners, and this right is vested not in any new
26 tribunal, but in the people, and the prople certainly have the right to elect all officers when not expressly deprived of such right by the constitution or by other positive law. The section of the constitution relied upon by the complainants certainly confers as much right upon the people to elect the county officers as it confers upon the county court.

It is insisted by complainants that the act in question "uproots" the workhouse law as it heretofore existed, and still exists in all other counties of the State. We submit, first, that the workhouse law here referred to is comparatively new, and that when it was enacted it uprooted a preceding law, and we are unable to see why this law, which so recently uprooted another, may not in its turn, properly be uprooted by the present law.

Complainants object to the act because it imposed a tax upon property within the limits of the city of Knoxville for support of macadam roads in the county. No reason is shown why this may not be done, and as a matter of act it is done by the very act of the legislature under which complainants claim to hold office. See Shannon's Code sec. 1788.

They further object to the act because certain disbursements of county funds are made by the road commissioners, whereas disbursements of a precisely similar characeter are made under the law under which complainants formerly held office. Shannon's Code, secs. 7409, 7410.

No reason is shown why the change should not be made, if, as a matter of fact it had been made as to these disbursements. Undoubtedly the legislature has the power to make such changes, and complainants seem to object to the policy of the legislature rather than to question its authority in the premises. If it should be seriously insisted that the power of taxation is conferred upon the commissioners, we can see no way of meeting the proposition except by traversing it. Nothing within any conceivable ingenuity can sup-

port the statement that any power of taxation is vested in
27 the road commissioners.

To the objection that the act violates section 17, art. 2, of the constitution, because it embraced in its caption and in its body two separate subjects, to wit, roads and workhouses, we say: First, that when the legislature has a particular purpose to accomplish, it may include in one act and under a general caption everything that is reasonably necessary to the accomplishment of that purpose. Where a subject is general, or a purpose single, all matters naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated, are properly included in the act, and are germane to its title. 90 Tenn. 484. See also State *vs.* Brown, 103 Tenn. 450.

The general purpose of this act is to secure a good system of public roads and it was proper therefore to embrace in the act everything reasonably connected with that purpose, and every measure which might facilitate its accomplishment.

It is true historically that the working of convicts upon the public roads is an established part of the public policy of Tennessee. It is also true that this policy has now the sanction of positive law. See Shannon's Code, sec. 1642.

The two subjects of public roads and workhouses have been connected in the history and in the legislation of Tennessee until that connection has become fixed and permanent. As a matter of policy it was clearly right that the commissioners being charged with the supervision of the road system, should also have charge of the convicts, so that the efficiency of their work might not be impaired by a divided jurisdiction.

We say further that if the two subjects had not been heretofore connected by positive legislation, there is no reason why they should not now be connected. There is no inherent incompatability. There is no radical or legal reason why they should
not be connected. In the developments of modern life,
28 many changes of law are made, and for the accomplishment of proper purposes, legislatures necessarily treat as connected many subjects heretofore separately treated. We submit the following quotation as a fair statement of a general principle which fully meets the contention of the complainants upon this point: "In titles relating to counties and county officers, general provisions may embrace subsidiary and germane matters; an act to increase the boundaries of a county may embrace provision for extending the borders of the county, locating the seat of justice and accepting donations for the public buildings." 23 Am. & Eng. Ency. Law 250, 251. The act in question is strictly analagous to an act creating a municipal corporation. An act, entitled An act to incorporate the town of Knoxville, would justify the insertion into the act of many provisions and principles, far more inconsistent with one another than the matters covered by the present act could possibly do.

It is finally insisted that the act violates section 17 of art. XI, because while at the next general election and always thereafter, the commissioners are to be elected by the people, they are at the out-

set, and until an election can occur to be appointed by the governor. We insist that it is not only logical and reasonable but that it is clearly established by the decisions of the supreme court, that temporary appointments of this kind can be made by the governor. This is clearly held in the case of State upon the relation of Smiley *vs.* Glenn, 7th Heis, pages 493, 494.

Finally we call attention to the fact that under the present act the board of public road commissioners must give bonds to Knox county subject to the approval of the county judge; they must account to the county court for all their expenditures and they are subject to impeachment by the county court, and vacancies caused by impeachment or otherwise, may be filled by the county
29 court until the next regular election. See act in question, sec. 15. In the matter of laying out public roads, there is an appeal to the county court. See sec. 6.

The act is not substantially different from the one under which the road system in the several counties in the State has heretofore been operated. The county court approves the bonds of the commissioners, exacts financial settlements from them, has the power to impeach them and has the right to supervise their action is laying off and opening public roads. Therefore the county court is not, in any respect, deprived of any act, and the act is a wise and well-considered one in aid of increased efficiency in the department to which it applies.

We have not considered it necessary to set out in full the reasoning upon which we rely for support of the several propositions herein submitted, because we have already prepared and filed a more elaborate brief covering the same points in the case of Condon *et als. vs.* Maloney, county judge, now pending in this court.

C. T. CATES, JR.,
J. W. CALDWELL,
*For Condon et als.*

30 STATE OF TENNESSEE *ex Rel.* GEO. L. MALONEY *et al.* *vs.* STEPHEN P. CONDON ET AL. } Knox County.

Filed Aug. 24, 1901. J. G. Stuart, D. C.

*Opinion.*

This is a bill in the nature of a *quo warranto* proceeding to test the right and title of defendants S. P. Condon, T. T. McMillan, James Rich and H. C. Anderson, to certain offices which they had entered upon under an act of the legislature, passed Feb. 8, 1901, providing for a board of public road commissioners.

The principal question in the case is as to the constitutionality of the act. This bill was filed on Mar. 11, 1901, by T. A. Rambo, G. L. Maloney, G. H. Strong, S. L. England, Sam. Vance, J. F. C. Harrell, and R. L. Peters against S. P. Condon, T. T. McMillan,

James Rich, and H. C. Anderson, and was filed in the name of the State on information of these relators, against the said defendants.

In the bill it was averred that the relators, G. H. Strong and T. A. Rambo were duly and legally elected by the county court of Knox county members of the pike commission for Knox county, for the term of four years from 1898; that the relators Vance and Harrell were elected members of the workhouse commission by the county court of Knox county at its January term, 1901; that S. L. England and I. N. White were elected commissioners of the workhouse of Knox county in January, 1900; that R. L. Peters was elected superintendent of the workhouse in January, 1898; that Geo. L. Maloney, as judge of the county court, was *ex officio* chairman of the workhouse commission. That on Feb. 8, 1901, the General Assembly passed an act creating the board of public road commissioners, the title and provisions of which are set out. That under and in pursuance of this act Governor Benton McMillin had appointed defendants S. P. Condon, James Rich and T. T. McMillan as the board of public road commissioners, defendant Condon
31 being superintendent of the public roads, and the other two defendants appointed as associate members of the road commission; that these defendants under and by virtue of their appointment and commission gave bond and qualified Mar. 20, 1901, and were then attempting to perform the duties of the offices.

It was alleged that this act did not repeal the act under which the defendants had been appointed and were acting, and second; that the act was unconstitutional and void, and that the relators have been unlawfully and illegally and wrongfully ejected and ousted from their positions and the defendants were illegally, unlawfully and wrongfully holding and exercising the offices of public road commissioners and superintendent of roads and were usurpers of these offices.

The prayer was that the parties named as defendants be made so by proper process, and an injunction prayed asking that they be enjoined from holding the offices of road commissioners or superintendent of public roads; that the act in question be declared unconstitutional and void and as conferring no rights on the defendants.

A demurrer was filed March 29, 1901, and the grounds set out; that the bill was founded solely on the assumption that the act under which the defendants were appointed was unconstitutional, and that this was not true as a matter of law, second that there was a misjoinder of parties, in that different complainants holding different offices were joined together; that the bill was multifarious for the same reason. The demurrer was heard Mar. 30, and the demurrer sustained and the bill dismissed.

As to the first ground that the bill was multifarious and a misjoinder of parties we deem it sufficient to say that while there were several relators, the bill is in the nature and on behalf of the State and the object of the bill was to test the constitutionality of the act of Feb. 8, 1901, and the right of defendants to exercise the
32 offices which they were claiming to hold and under which

they had ejected complainants from their various offices, and we think the bill is not demurrable on that ground.

The second ground is that the bill was founded solely on the assumption that the act of 1901, was unconstitutional. This is obviously true and the real and only serious question in the case is as to the constitutionality of this act.

This question is raised and fully discussed in the opinion of this court rendered thereon in the case handed down at the same time as this opinion of S. P. Condon *et al. vs.* Geo. L. Maloney, judge. The result reached in that case was that we held the act in question to be constitutional. The defendants have qualified under that act and entered upon the discharge of their duties, and are entitled therefore to hold these offices according to the provisions of the act in question. It therefore results that the demurrer of the defendant should have been sustained, and the decree of the chancellor dismissing the bill is in our opinion correct and is affirmed with costs.

All concur.

R. M. BARTON, JR., *Judge Ac.*

33 Court of Chancery Appeals of Tennessee, at Knoxville, April Term, 1901.

THURSDAY, *August* 29, 1901.

Court met pursuant to adjournment.

Present and presiding: The Hon. Judges R. M. Barton, M. M. Neil, and S. F. Wilson.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:

STATE OF TENNESSEE *ex Rel.* G. L. MALONEY ET AL. *vs.* STEPHEN P. CONDON. } Affirmed and Appealed.

This cause was heard this 29th day of August, 1901, before the hon. court of chancery appeals, of the State of Tennessee, upon the transcript of the record from the chancery court of Knox county, the assignment of errors by the appellant and the reply of the appellees thereto, and argument of counsel having been heard, the court is of the opinion that complainants are not entitled to maintain their bill, and that the decree of the chancellor should be affirmed.

It is therefore ordered, adjudged, and decreed that the same be and it is hereby affirmed.

The costs of this court will be paid by the appellants, G. L. Maloney *et als.*, and the sureties on their appeal bond, Green and Shields, and Pickle and Turner, for which execution is awarded. The costs of the court below will be paid as ordered in the chancellor's decree.

The opinion and finding of the court of chancery appeals being in writing is made a part of the record in this cause and will be attached to the transcript.

From the foregoing decree, Geo. L. Maloney *et als.*, complainants below, pray an appeal in the nature of a writ of error to the next term of the supreme court at Knoxville, on the second Monday of September, 1901, which is granted.

34 In the Supreme Court at Knoxville, Tenn., September Term, 1901.

STATE *ex Rel.* GEO. L. MALONEY ET AL. *vs.* STEPHEN P. CONDON ET AL. } No. —. From Knox County.

Filed Sept. 21, 1901. Alex. McMillan, Clerk.

*Assignment of Errors and Brief on Behalf of Relators.*

Statement of the case.

I.

This is a proceeding in the nature of a *quo warranto*, brought by the State, on the relation of certain citizens of Knox county, averring that the defendants in assuming to act as a board of road commissioners, and to manage and control the public roads and workhouses of Knox county, are acting without authority of law, and are usurpers of said offices. The chancellor dismissed the bill upon demurrer, and the complainants have appealed. The court of chancery appeals have sustained the chancellor's decree, and complainants have appealed from that decree, and assign errors as follows:

II.

*Assignment of Errors.*

The court of chancery appeals erred in sustaining the constitutionality of the act of 1901, (Acts 1901, chap. 8) under which the defendants were appointed road commissioners by the governor of the State.

Said act is unconstitutional for several reasons:

1. It constitutes vicious class legislation, and thereby violates art. 1, sec. 8 and art. 11, sec. 8, of the State constitution, and the 14 amendment to the Federal Constitution.

Sutton *vs.* State, 96 Tenn. 696.;
Burkholtz *vs.* State, 16 Lea, 71;
Woodward *vs.* Bryan, 14 Lea, 520;
35 Weaver *vs.* Davidson County, 104 Tenn. 328;
Harbison *vs.* Iron Co., 103 Tenn. 422;
Ragio *vs.* State, 86 Tenn. 272;
Strattons *vs.* Morrises, 89 Tenn. 499;
Mamphis *vs.* Fisher, 9 Baxter 239;
Pope *vs.* Phifer, 3 Heisk. 701;
Cooley on Const. Limitations, 490.

2. Said statute embraces in its caption and body two distinct subjects of legislation, to wit: roads and workhouses, and thereby violates art. 2, sec. 17 of the State constitution.

See cases above cited.

3. Said act violates art. 11, sec. 17 of the constitution in that it authorizes the governor to appoint road commissioners who are county officers, and therefore electible by the people or the county court.

Pope *vs.* Phifer, 3 Heisk. 700.
State *ex rel. vs.* Glen, 7 Heisk. 472.

Wherefore relators insist that said decree should be reversed, and their bill sustained.

GREEN & SHIELDS,
PICKLE & TURNER,
*For Relators.*

36 Filed Sept. 30, 1901. J. G. Stuart, D. C.

STATE OF TENNESSEE *ex Rel.* G. L. MALONEY ET ALS.
*vs.*
STEPHEN P. CONDON ET ALS.

This cause was decided in favor of appellees, Condon *et als.* by the court of chancery appeals, in affirmation of the decree of the chancellor. No questions are now raised by appellants which were not raised before the court of chancery appeals, and only questions of law are presented. The appellees to avoid encumbering the record unnecessarily, hereby adopt the brief filed by them in the court of chancery appeals and have refiled the same, as an answer to the assignment of errors in this honorable court.

C. T. CATES, JR.,
J. W. CALDWELL,
*For Condon et als.*

37 Supreme Court of Tennessee, at Knoxville, September Term, 1901.

FRIDAY, *November* 13, 1901.

Court met pursuant to adjournment.

Present and presiding: The Hon. Chief Justice D. L. Snodgrass, and the Hon. Associate Justices W. C. Caldwell, John S. Wilkes, W. K. McAlister, and W. D. Beard.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:

STATE OF TENNESSEE *ex Rel.* GEORGE L. MALONEY ET AL.
*vs.*
STEPHEN P. CONDON ET AL.
} Affirmed.

This cause was heard on this 15th day of November, 1901, before the hon. the supreme court of Tennessee, on the transcript of the

record from the chancery court of Knox county, Tennessee, the written finding of facts and the opinion of the court of chancery appeals, the assignment of error by the appellants, the reply thereto by the appellees, and argument of counsel, from all which the court is of opinion and doth decree first, that chapter (8) eight of the published acts of the General Assembly of the State of Tennessee for the year 1901, passed and approved February 8, 1901, and entitled "An act to create a board of public road commissioners, to regulate the laying out and working of public roads in this State, in counties having a population of not less than 70,000 and not more than 90,000 under the Federal census of the year, 1900, or any subsequent Federal census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this act" is a valid and constitutional act; and second that there is no error in the decree of the chancellor or in the decree of the court of chancery appeals, which decrees are accordingly hereby in all things affirmed. The costs of this court will be paid by appellants Geo. L. Maloney and others and sureties on the appeal bond, Green and Shields and Pickle & Turner; the costs of the lower court will be paid as heretofore decreed in them
38 respectively, for all which execution is here awarded.

The complainants raised, relied upon and on the hearing pressed the question by oral and printed arguments that said act, to wit, ch. 8, Acts 1901, violated and was in conflict with the XIV amendment to the Federal Constitution, and was on that account invalid; that it denied to the people of Knox county the equal protection of the laws, anridging their privileges and depriving them of rights without due process of law.

These contentions are overruled, the court being of opinion the statute and action complained of are not forbidden by the XIV amendment.

STATE OF TENNESSEE *ex Rel.* —— ——
*vs.*
STEPHEN P. CONDON ET AL.

*Assignment of Errors for the Supreme Court of the United States.*

SATURDAY, *November* 16, 1901.

The complainants, by their solicitors, except to the action and decree of the supreme court of the State of Tennessee sustaining the road and workhouse law of Knox county, chapter 8, of the Acts of 1901, and holding that the same is not void, and refusing to hold said act in conflict with the XIV amendment to the Constitution of the United States, and assign this as error upon said decree.

39 UNITED STATES OF AMERICA, *ss:*

To Stephen P. Condon, T. T. McMillan, James Rich, and H. C. Anderson, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden in the city of Washington, within thirty days from the date hereof, pursuant to a writ of error prosecuted by the complainant in the case of The State of Tennessee, *ex rel.* G. L. Maloney *et al. v.* Stephen P. Condon, T. T. McMillan, Jas. Rich & H. C. Anderson, to reverse a decree therein of the supreme court of Tennessee, to show cause, if any there be, why the decree in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th November, in the year of our Lord nineteen hundred and one, and of the Independence of the United States of America one hundred and twenty-five.

D. L. SNODGRASS,
*Chief Justice of the Supreme Court of Tennessee.*

Filed Nov. 16, 1901.
ALEX. McMILLAN, *Clerk.*

[Endorsed:] State *ex rel.* —— —— *v.* S. P. Condon *et al.* Citation. We acknowledge service of the within and foregoing citation and of the writ of error therein mentioned for and on behalf of the appellees, S. P. Condon, Jas. Rich, T. T. McMillan and H. C. Anderson. Nov. 16, 1901. Joshua W. Caldwell, att'y for Condon *et als.*

40 Filed Nov. 16, 1901. Alex. McMillan, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme judicial court of the Commonwealth of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court of the Commonwealth of Tennessee, before you or some of you, being the highest court of law or equity of the said Commonwealth in which a decision could be had in the said suit between The State of Tennessee on the relation of G. L. Maloney *et al.*, complainants, and Stephen P. Condon, T. T. McMillan, Jas. Rich, & H. C. Anderson, defendants, wh-rein was drawn in question the validity of a statute of the said State, to wit, chapter 8, Session Acts of 1901, on the ground that it was repugnant to the XIV amendment to the Constitution of the United States, and the decree was in favor of the validity of said statute in said State supr-me judicial court: a manifest error hath happened, to the great damage of the said State of Tennessee

on the relation of said G. L. Maloney, *et al.*, as by its complaint appears. We being willing that *that* error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the second Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

41 Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 15th day of November, in the year of our Lord one thousand nine hundred and one.

[The Seal of the Circuit Court, District of East Tenn.]

HENRY O. EWING, *Clerk*,
By J. T. CARTER,
*Deputy Clerk U. S. Circuit Court for the Eastern District of Tenn.*

Allowed by—
D. L. SNODGRASS, *C. J.*

41½ [Endorsed:] No. — State *ex rel.* —— —— vs. S. P. Condon *et al.* Writ of error. Pickle & Turner, attorneys-at-law, office in Deaderick building, Knoxville, Tenn.

42 Know all men by these presents that we, T. A. Rambo, G. L. Maloney, G. H. Strong, S. L. England, Sam. Vance, J. F. G. Harrell, and R. L. Peters, as principals, and Pickle & Turner as sureties, are held and firmly bound unto Stephen P. Condon, T. T. McMillan, James Rich, and H. C. Anderson in the full and just sum of five hundred dollars, to be paid to the said obligees, their certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our *sales* and dated this 15th November, A. D. 1901.

Whereas, lately at a session of the supreme court of Tennessee, in a suit pending in said court between the State of Tennessee, on the re*al*tion of the above-named obligors against the above-named obligees, a decree was rendered against the complainants, the plaintiffs in error herein, who have obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and citation directed to the said obligees citing and admonishing them to be and appear at the United States Supreme Court, to be holden at the city of Washington, within thirty days from the date hereof:

Now the condition of the above obligation is such that if the said

State of Tennessee, on the relation of the above-named obligors shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and effect.

T. A. RAMBO,
G. L. MALONEY,
G. H. STRONG,
S. L. ENGLAND,
SAM. VANCE,
J. F. C. HARRELL,
R. L. PETERS, *Principals*,
By G. W. PICKLE,
PICKLE & TURNER,
*Solicitors.*

Approved this 15th Nov., 1901.

D. L. SNODGRASS, *C. J.*

Endorsed: Bond. Filed Nov. 16, 1901. Alex. McMillan, clerk.

43 Clerk of the Supreme Court:

Transcript $20.00; seal .50; fil'g citation .50; fil'g writ of error .50; fil'g bond .50; fil'g assmt. of error .50; paid by complainants..... $22.50

ALEX. McMILLAN, *Clerk.*

Office of the Clerk of the Supreme Court for the Eastern Division of the State of Tennessee, at Knoxville.

I, Alex. McMillan, clerk of said court, do hereby certify that the foregoing is a full, true, and correct copy of the transcript and the record of all proceedings had in this cause, except the written opinion filed by the supreme court in this case, which is in hands of court for correction and will be certified when returned to office, as the same appear of record and on file in my office in this cause.

In testimony whereof I have hereunto set my hand and affixed the seal of the court at office in Knoxville, Tenn., on this the 7th day of December, 1901.

[Seal of the Supreme Court, Knoxville, Tenn.]

ALEX. McMILLAN, *Clerk.*
J. G. STUART, *D. Clerk.*

Endorsed on cover: File No. 18,349. Tennessee supreme court. Term No. 496. The State of Tennessee on the relation of G. L. Maloney *et al.*, plaintiffs in error, *vs.* Stephen P. Condon, T. T. McMillan, James Rich, and H. C. Anderson. Filed December 10th, 1901.

ILE COPY.

23942

Office Supreme Court U. S.
FILED
FEB 10 1903
JAMES H. MCKENNEY,
Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 209.

The State of Tennessee, Ex. Rel. G. L. Maloney, et al.

vs.

Stephen B. Cowden, et al.

BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

J. W. GREEN,
PICKLE & TURNER,
for Appellants.

# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

---

No. 209.

**The State of Tennessee, Ex. Rel. G. L. Maloney, et al.**

vs.

**STEPHEN P. CONDON, et al.**

---

## BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

---

### I.

### STATEMENT OF THE CASE.

The contention of the Relators is that they have been deprived of liberty or property, and of the equal protection of the laws, in violation of the 14th Amendment of the Federal Constitution, by an unconstitutional statute of the State of Tennessee.

This is a statutory proceeding in the nature of *quo warranto,* brought in the name of the State, on the relation of certain citizens and office-holders, against the defendants. It is averred in the petition that the Relators G. H. Strong and T. A. Rambo were elected by the County Court of Knox County, Tennessee, Pike Commissioners, for the term of four years; that Relators Sam Vance, J. F. C. Herrell, S. L. England and I. L. White were elected in like manner Workhouse Commissioners of Knox County, for a term of two years each; that Relator G. L. Maloney is County Judge of said county, and is *ex officio* the Chairman of both of said Commissions; and that Relator R. L. Peters was

elected Superintendent of the Workhouse of said county for the term of four years, and that all of said officials had been duly qualified, and were filling and performing the duties of their said respective offices, and entitled to the emoluments of same, on and prior to the 16th day of February, 1901. They aver that their respective terms of office did not expire until some time subsequent to said date.

It is further averred that on the 8th day of February, 1901, the General Assembly of the State of Tennessee passed an Act repealing the statutes under which the Relators had been elected and were holding their said offices and receiving their emoluments, and substituted in their stead and room, a Board of Public Road Commissioners composed of three members.

Said Act authorized the Governor to appoint these Road Commissioners, and it is averred that on the 16th day of February, 1901, the Governor did appoint the defendants as members of this Board. It is further averred that the defendants have ousted the Relators of their said offices. This was done by mandatory injunction, as appears from the opinion of the Supreme Court of the State.

It is contended that said statute, under color of which the defendants ousted the Relators of their said offices and deprived them of the emoluments thereof, is illegal, null and void. This petition was dismissed on demurrer, and the Relators appealed to the Supreme Court of the State.

The Relators assigned as error in the Supreme Court of the State that said Act of February 8, 1901, was void under the 14th Amendment to the Federal Constitution.

**Record, pp. 11-13.**

The Supreme Court of the State affirmed the decision of the lower court, overruling all objections made to the constitutionality of said Statute, including that which insisted that said statute was in violation of the 14th Amendment. The Relators have prosecuted writ of error.

Prior to said Act of February 8, 1901, general statutes of the State had provided separate systems for the regulation of

public roads, for the regulation of turnpikes, and for the regulation of county workhouses. These statutes were general in their character. Under all of these statutes it was provided that the officials required for the management of these local affairs should be elected by the County Court, and Relators were in fact elected in conformity to these statutes, and were acting under them when ousted by the defendants.

The caption and such portions of the Act of February 8, 1901, as are material to the present inquiry are set out in Appendix A to this brief.

It will be observed that this Act purports to be general, though it is confined by its terms to counties having a population of not less than 70,000 nor more than 90,000, under the Federal Census of the year ~~1890~~ 1900 or any subsequent Federal Census.

Under the census of 1890, no county of the State had a population between 70,000 and 90,000. Under the census of 1900, which had been taken before the passage of the Act of 1901, only one of the ninety-six counties of the State had a population between those limits, and that one was Knox County, having, under that census, 74,304.

It will be observed of this Act that it contains no provision whatever in regard to the other ninety-five counties of the State. Under the Federal Census of 1900, of the other ninety-five counties of the State, two of them had a population exceeding 90,000, to-wit: Davidson, with a population of 122,815, and Shelby, with a population of 153,557; while the other ninety-three counties had, by that census, less than 70,000 population. The next largest county below Knox County, to-wit, Hamilton County, had a population of 61,695. Substantially the same conditions existed under the census of 1890, Davidson and Shelby Counties having more than 90,000, and all of the others, including Knox County, having less than 70,000.

While Knox County is not named, it is described by designation as certainly as if named, as the sole object at which this invidious and discriminating Act was leveled.

It will be observed that this Act is not one that deals with

the county in its corporate capacity, but the county is made to serve as a unit for the classification of citizens for road, turnpike, and workhouse purposes. These purposes are of a public and general nature. Contrary to all former usages and statutes, the three subjects of public roads, turnpikes and workhouses are combined in a single Act, and the power to appoint the Commissioners until the next general election is conferred upon the Governor. In no other Act ever passed in Tennessee regulating any of these subjects, has the power of appointment of the local officials been conferred upon the Governor of the State. It will be observed likewise that this Act subjects all of the male inhabitants of Knox County—the only county included within the description—between the ages of 18 and 50 years, to work on the public roads. It likewise requires the County Court to levy a tax upon all property in the districts outside of the corporate limits of cities and towns, for the purpose of improving dirt roads in the county, of not less than 10 cents nor more than 25 cents, and for the construction and improvement of macadam roads, a tax of not less than 10 nor more than 15 cents, on the $100, to be expended by the Commissioners.

**See Session Acts 1901, Ch. 8.**

At the same session of the General Assembly at which said Act was passed, another act embracing counties having a population of from 120,000 to 150,000, by the last or any succeeding Federal Census, provided that the present Road Commissioners should serve until their successors should be elected and qualified, which should be done at the general August election in 1902. This Act applied alone to Davidson County under the Federal Census of 1900. It makes a remarkable discrimination between Davidson and Knox Counties with reference to the manner in which Road Commissioners should be appointed or elected.

**Session Acts of 1901, Ch. 55.**

Shelby County, having a larger population, is excluded from the operation of this act, though purporting to be general in its terms, as are all the rest of the counties of the State—the other counties having less than 120,000 population.

At the same session of the Legislature another Act purporting to be general and applying to counties of 70,000 population and less, by the Federal Census of 1900, or any subsequent Federal Census, provided for the election of Road Commissioners by the County Court. It likewise provided that all the male residents of the county, between the ages of 21 and 45 years, should be subject to road labor, except those who have been exempted by the County Court for physical disability, etc., and that the County should levy each year, for road purposes, an *ad valorem* tax on all property of their respective counties, outside of towns, cities and taxing districts, of 2 cents on each $100 of taxable property for each day assessed to labor on public roads. Failure to work the roads as required is declared a misdemeanor.

**See Session Acts 1901, Ch. 136.**

It appears from this Act that counties included within its limitations have their Road Commissioners elected by the County Courts, instead of being appointed by the Governor, as provided for Knox County. While the people of Knox County, under the Act applicable to them, are subject to road service between the ages of 18 and 50 years, the people of ninety-three counties under the last mentioned Act, are subject to road service only from 21 to 45 years of age. Those subject to road service in Knox County are compelled to work the roads seven years longer than in any county having less than 70,000 population. Knox County has only a little over 70,000 population.

The people of Knox County are subject to a minimum tax of 20 cents for road and turnpike purposes, which is not proportioned at all by the tax imposed upon labor, while in counties having a population under 70,000, the tax is only 2 cents on the $100 for each day of labor assessed. These are distinct burdens and deprivations that are laid upon Knox County, to which no other county of the State is subject. Labor for road purposes is but a method of taxation to reach that class who do not pay the property tax.

It was under the color of this arbitrary, unjust, unequal and discriminative statute, applicable to Knox County alone, that the

defendants were, by mandatory injunction, as the appointees of the Governor, thrust into offices that were filled by the Relators under appointment of the County Court, as had been the custom and the law in previous time. The reasons for the enactment of this statute and its purposes will be noticed in another connection.

While this Court cannot annul this statute upon any opinion that it may entertain of its wisdom or policy, it is not inappropriate to add that this statute violates not only the letter and spirit of the constitution of the State, but in the matter of conferring the appointment of local officials upon the Governor of the State, it violates a settled public policy that has prevailed in this country from the foundation of the government.

"In an examination of American constitutional law, we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subjects upon which the power is to operate.

"In contradistinction to those governments where power is concentrated in one man, or one or more bodies of men, where supervision and active control extend to all the objects of government within the territorial limits of the State, the American system is one of complete decentralization, the primary and the vital idea of which is that local affairs shall be managed by local au thorities, and general affairs only by the central authorities. * * * It is this, also, that impels the several States, as if by common arrangement, to subdivide their territory into counties, towns, roads and school districts, and to confer upon each the powers of local legislation. * * * The system is one which almost seems a part of the very nature of the race to which we belong. A similar subdivision of the realm for the purpose of municipal government has existed in England from the earliest ages, and in America, the first settlers, as if instinctively, adopted it in their frame of government, and no other has ever supplanted it or even found advocates. In most of the colonies the central power created and provided for the organization of the towns; in one at least, the towns preceded and created the central authority; but in all the result was substantially the same, that towns, villages, boroughs, cities and counties exercised the powers of local

self-government, and the Colony or the State, the power of a more general government.

"The several State constitutions have been framed with this system in view, and the delegations of power which they make, and the express and implied restraints which they impose thereupon, can only be correctly understood and construed by keeping in view its present existence and anticipated continuance.

"There are few of the general rules of constitutional law that are not more or less affected by the fact that the powers of government are not concentrated in any one body of men, but are carefully distributed, with a view to being exercised with intelligence, economy and fidelity, and as far as possible by the persons most directly and immediately interested."

**Cooley Constitutional Lim., pp. 189-191 (3rd Ed.)**

These principles were also promulgated by Judge Cooley while on the Supreme bench of Michigan, in his great opinion in *People vs. Hurlburt, 24 Mich., 44: 9 Am. Rep., 103,* which has been much quoted since.

In that opinion he said: "The State may mould local institutions according to its views of policy or expediency, but local government is a matter of absolute right and the State cannot take it away."

Thomas Jefferson said: "These wards, called townships in New England, are the vital principle of our government, and have proved themselves the wisest inventions ever devised by the art of man for the perfect exercise of self-government and for its preservation. As Cato then concluded every speech with the words, *Carthageno delenda est,* so do I every opinion, 'Divide the country into wards.'"

If contrary to settled public policy and long continued usage, the people may be deprived of their cherished right of local self-government, it ought to be done by *general law* applicable to all the people of all the counties in the State, and not by an invidious statute, saddled upon a single county, by the representatives of the other ninety-five counties, who are unwilling to accept the same rule and regulation for their own constituents.

It is pertinent to quote in this connection the language of Judge Catron, the Chief Justice of the Supreme Court of Ten-

nessee, and afterwards an associate Justice of this Court, in the case of *Wally vs. Kennedy, 2 Yerger, 555, 557*, which has since been quoted and approved in opinions of this Court. Chief Justice Catron, defining the meaning of the phrase, "law of the land," which is the equivalent of "due process of law," says:

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body-politic or 'land,' under similar circumstances, and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by conferring remedies leading to the same consequences, is unconstitutional and void. *Were it otherwise, odious individuals or corporate bodies would be governed by one law, most of the community and those who make the law by another. Whereas, a general law affecting the whole community equally could not have been passed. * * * The part of the constitution referred to was intended to secure to weak and unpopular minorities and individuals, equal rights with the majorities, who from the nature of our government must exercise the legislative power. Any other construction of the constitution would set up the majority in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure, by odious laws, binding on the latter only.*"

**See VanZant vs. Waddell, 2 Yerger, 260.**
**Cotting vs. Goddard, 183 U. S., 79; 46 Lawyer's Ed. 92.**

At the same session of the Legislature that passed this obnoxious law, another statute was passed, as stated, declaring that the Road Commissioners in Davidson County, who had been elected by the people or the County Court, should retain their offices until the next general election, and still another statute was enacted providing that Road Commissioners for all counties in the State, having less than 70,000 inhabitants, should be elected by the County Court. This last law embraces all the counties of the State, except three—Davidson, Shelby and Knox. For the County of Knox alone, it was provided that the Governor of the State should appoint these officers.

Why was this discrimination made against Knox County? At the same session of the General Assembly a commendable zeal was manifested to maintain and restore the right of home rule to

the people by the submission of a constitutional amendment making the Secretary of State elective by the people.

**Session Acts 1901, Ch. 73.**

By the submission of another amendment for the election of the State Treasurer and State Comptroller by the people.

**Session Acts 1901, Ch. 74.**

By the submission of another amendment making Clerks and Masters of the Chancery Courts elective by the people.

**Session Acts 1901, Ch. 80.**

And this is not all. The constitution of the State as originally promulgated in 1870, had authorized special acts applicable to counties or smaller districts, with reference to game and fish. An amendment was proposed to this clause of the constitution to enable the Legislature to pass like laws for the establishment and maintenance of public roads, and for the enactment of fence laws, and for the care and control of domestic animals.

**Session Acts 1901, Ch. 79.**

This last proposition is a distinct expression of opinion by the Legislature that it did not have the power to pass such special laws, without such an amendment.

The Supreme Court of the State had in a recent opinion so held, deeming the question so plain as not even to require a written opinion.

## II.

## *ARGUMENT.*

(1) *The Statute, being Chapter 8 of the Acts of 1901, regulating the public roads, turnpikes and workhouse in Knox County, and providing for the people of that county different rules and regulations, and imposing upon the citizens of that county greater burdens of taxation, both of property and labor, and subjecting them to a different rule of criminal liability, and prescribing a different method of appointment of officials from those applicable to other counties in the State, is wanting in the essentials of due process of law, and deprives the Relators of liberty or property,*

*in violation of the 14th Amendment of the Constitution of the United States.*

This statute is not one that deals or purports to deal with a municipality or municipalities, in reference to purely municipal affairs. It purports to be a general statute applicable to a class. It deals with the rights of the people and imposes burdens on the people, using the county merely as a unit for classification for these purposes. It deals with matters of general public interest, and such matters as are common to all the counties of the State. These matters have always been provided for by general laws, and are susceptible of general regulations, applicable to all the counties alike. It provides for matters of taxation, filling public office, etc. It has never been assumed that such an Act could be made applicable to a single county. The form of the Act in this case is a concession that a special Act, applicable to a single county, *by name*, could not be validly passed. The submission by the Legislature that passed this Act of an amendment to the Constitution, authorizing legislation of this class applicable to a single county is a concession of that body that it had no such power at the time this statute was passed.

It was assumed by counsel in the State Courts and by the Supreme Court of the State in its opinion, that no such special Act, applicable to a single county *by name* could be validly enacted. The question, therefore, whether this Act constitutes a valid law, is dependent upon the other question, whether it is based upon an admissible classification. It is confessedly class legislation. However, this is true of this Act in a limited sense.

If it be held to be based upon any classification at all, it is a classification that includes only one county and excludes all others, *taking no notice of the other counties whatever*. In determining whether the Act is valid as class legislation, the Court looks not so much to its form as to its operation and effect. The fact that it is general in form will not protect it, if it is special and arbitrary in its effect and operation.

While this Act does not name Knox County, it does the same thing by designation. The Federal Census which is referred

to, and must therefore be read into the Act, shows that neither under the Federal Census of 1890 nor under the Census of 1900, was any other county included. Nor was any other county above or below Knox County near enough to the minimum or maximum limits prescribed to be probably included in it for many years to come.

"The Act might as well have expressly named the particular objects included, to the exclusion of all others. So far as this particular provision of the Constitution is concerned, it is immaterial that the Act is general in form. The question is always as to its effect. Any other doctrine would render nugatory the prohibition of the fundamental law against special legislation. Under the guise of statutes, general in form, special legislation in effect could be adopted, with no inconvenience, and the evil to be extirpated would flourish unchecked."

**Edmunds vs. Herbrandson, 14 L. R. A., 725.**

"In determining whether a law is general or special, Courts will look not to its form or verbiage, but to its substance and necessary operation." *Idem.*

**Nichols vs. Walton, 37 Mass., 264.**

"It is not the form that the statute is made to assume, but its operation and effect, which is to determine its constitutionality."

**State vs. Pugh, 43 Ohio State Rep., 98.**

"A law general in its terms but applying to but one county by reason of population, etc., is void."

**Devine vs. Cook County, 84 Ill., 590.**

"An Act relating to Notaries, which in effect applies only to a single county, is void."

**State vs. Herman, 75 Mo., 340.**

"A statute fixing the salary of County Court Clerks, which in effect applies to a single county, is void."

**Gibbs vs. Morgan, 39 N. J. Equity, 126.**

"An Act to lay out, open and improve public roads in each county in the State is unconstitutional if one county is excepted from its operation."

**State vs. Hudson County, 50 N. J. Law, 82.**

In *Commonwealth vs. Patton, 88 Penn., 258,* a statute gen-

eral in form, but so worded that it could apply to only one county, was characterized as "classification run mad."

"Attempts in covert modes to defeat its (the Constitution's) plain provisions, must be set aside with the same certainty as when methods are open."

**113 Pennsylvania State, 176.**
**State vs. Ellett, 2 Am. State Rep., 787, Note.**

The case of *Cotting vs. Goddard, 183 U. S., 79: 46 Lawyer's Edition, page 92,* is strikingly in point. In that case a statute general in terms, applying to all corporations conducting a stockyards business, and having done a certain amount of business during the preceding year, was held vicious class legislation, because of the fact that it appeared that only one stockyard, to-wit, the Kansas City Stock Yard, fell within the statute, although there were others in the State doing less than the minimum amount of business prescribed.

The Court held that it was in effect the designation of the Kansas City Stock Yard, although that corporation was not named in terms. The Court stated "that it may be assumed for the purposes of the questions now to be considered that so far as the Constitution of Kansas is concerned, its Legislature may enact a law general in terms, and so phrased as necessarily to operate only upon a single individual or corporation, but while making that concession, *we cannot shut our eyes to the fact that this Act is precisely the same in its effect as though the Legislature had said in terms that the Kansas City Stock Yards alone shall be subject to its provisions.* Accepting, however, the full force of the general language in which the statute is couched, it appears that the classification is attempted between stockyards doing a large and those doing a small business. The expressed and only basis of classification is in the amount of business done by the two classes. * * * The possibility of such legislation suggests the warning words of Judge Catron, afterwards Mr. Justice Catron of this Court, in Van Zant vs. Waddell, in 2 Yerger, 262, who said: 'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitu-

tional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the masses of the community who made the laws by another.'"

There is no doubt but that this statute was designed to embrace only one county, to-wit, Knox, and that it does embrace no other. This purpose of the act is very thinly disguised by the classification with reference to population. For this reason alone the act is arbitrary and void.

Special Acts applicable to a single county have been held void by the Supreme Court of Tennessee, in the following cases.

**State vs. Bryant, 6 Heisk., 188.**
**Pope vs. Phifer, 3 Heisk., 683.**

But regarding this law as based upon classification, the classification is utterly arbitrary and capricious The power of the Legislature to pass laws affecting classes, under certain limitations, is conceded, but in order that such class legislation shall conform to the requirement of due process of law, or be the law of the land, within the meaning of the constitutional provisions on the subject, it is essential that it be based upon classifications that are just and reasonable, and not arbitrary or capricious. This is the doctrine of the Supreme Court of Tennessee, as well as of this Court.

The doctrine as it prevails in Tennessee is nowhere better stated than in the opinion of Special Judge Ed Baxter, in the case of *Stratton Claimants vs. Morris Claimants, 89 Tenn., 534.* In that case Judge Baxter, after reviewing all of the Tennessee cases on the subject, says: "We conclude, upon a review of the cases referred to above, that whether a statute be public or private, general or special in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such must be natural and not arbitrary. If the classification is made under Art. XI., Sec. 8, of the Constitution, for the purposes of conferring upon a class the benefit of some special right, privilege, immunity or exemption, there must be some good or valid reason why that particular class should alone be the recipient of the benefit. * * * If the classification is under Art. 1, Sec. 8,

everyone who is in or who may come into the situation and circumstances, *which constitute the reason for and the basis of the classification*, must be subject to the disabilities, duties, obligations and burdens imposed by the statute, or it will be partial and void, and if the classification is made under Art. XI., Sec. 8, everyone who *is in or who may come into the situation and circumstances, which constitute the reasons for and basis of the classification*, must be entitled to the rights, privileges, immunities and exemptions conferred by statute, or it will be partial and void."

Chief Justice Beasley, in *State vs. Hammer, 42 N. J. Law, 439*, has thus felicitously stated the true rule on this subject, to-wit: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as a basis for classification *must be of such a nature as to mark the object to be designated, as particularly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject matter of the proper legislation between the objects or places embraced in such legislation, and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree at least account for and justify the restriction of the legislation.*

**14 L. R. A., 727.**

In *Edmunds vs. Hebrandson, 14 L. R. A., 727*, Chief Justice Corliss uses this language on this subject, to-wit: "Where shall the line properly be traced? We believe in testing this question these inquiries should be made. Would it be unjust to include the classes or objects or the persons excluded? Would it be unnatural? Would such legislation be appropriate to them? Could it properly be made applicable? Was there any reasonable ground for excluding them? * * * The classification must be natural, not artificial. *It must stand upon some reason having regard to the character of the legislation.*"

In *R. R. vs. Ellis, 165 U. S., 150*, Mr. Justice Brewer delivering the opinion of this Court, and speaking of the classification requisite under the 14th Amendment, says: "The State cannot

say that all white men shall be subject to the payment of attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. *These are distinctions which do not furnish any particular basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis."*

And in *Waggoner vs. Bank, 170 U. S., 294,* the above language was quoted with approval, and the Court added "that classifications for legislative purposes *must have some reasonable basis upon which to stand. It must be evident that differences which would serve as a classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.* Thus the Legislature may fix the age at which persons may be deemed competent to contract for themselves, but no one will claim that competency to contract can be made dependent upon stature or color of hair. Such a classification for such a purpose would be arbitrary, and a piece of legislative despotism, and therefore not the law of the land."

Our own case of *Van Zant vs. Waddell, 2 Yer., 260,* and *Stratton Claimants vs. Morris Claimants, 89 Tenn., 497,* have been quoted with approval upon this subject by this Court.

Such is the general rule stated in its best form by some of the ablest Judges who have ever written upon the subject. It is moreover well settled that the Legislature is not the final arbiter on this question of classification.

"The Legislature cannot finally settle the question of the boundary to be drawn. Such a view of the organic law would bring upon this Court the just reproach that it had suffered the Legislature to disregard the constitutional barrier by relegating to it where that barrier should be set up."

**14 L. R. A., 727.**

The Courts will not affect to be blind to palpable infirmities

of statutes. They will not subject themselves to the reproach that they have eyes, but see not, and ears, but hear not, even for so worthy an object as saving a statute from constitutional infirmity. This was signally illustrated in the opinion of the Supreme Court of Tennessee in the case of *Sibley vs. State, 107 Tenn., 515.*

Nor is the decision of the State Court conclusive upon this Court on questions of this sort.

It is settled by numerous decisions of this Court that in determining whether a State statute is in conflict with the Constitution of the United States, this Court will proceed by original inquiry to determine the question, without bias or reference to the State decision. If this were not the law, then this Court, following the decisions of the Courts of the several States, would have as many rules of construction as are to be found in the varying decisions of the State Courts.

It is true that the Courts give much consideration and weight to classifications that have been prescribed by the Legislature, and will not lightly declare them unconstitutional. But Courts will, nevertheless, not hesitate to inquire whether the Legislature had the power in the particular case to make the classification, and whether the classification is arbitrary.

In view of these rules, we ask, what reason can be conceived of or suggested, why Knox County, *on account of its population, being between the limits of 70,000 and 90,000,* should have prescribed for it different rules with reference to the election of its Road Commissioners, or the imposition of labor and property taxation upon its citizens for road purposes, and with reference to criminal liability of its citizens, from those prescribed for the citizens of other counties of the State, having both greater and less population? Population alone is made the basis for the distinction and for the classification in this statute. The reason for the distinction must therefore be found in the differences of population of the several counties of the State. It is not enough to say that the Court will take it for granted the classification made by the Legislature is proper, if no reason can be suggested for the classification. The Court cannot determine otherwise in

such a case than that the classification is capricious and arbitrary. Counsel for the defendants did not attempt in the State Courts to suggest a reason for this arbitrary classification. The Supreme Court of the State made an effort to do so in the opinion which is printed as Appendix B to this brief.

That Court chiefly relied upon the proposition that it would not disturb the classification made by the Legislature, although the reasons for such classification were not apparent. But not feeling quite sure of its ground, added the following statement: "But it is urged that no reason has been assigned for the limitation of the operation of the Act to counties having a population of not less than 70,000 nor more than 90,000, and thus necessarily excluding the counties of Davidson and Shelby, each having a population, according to the Federal Census, largely in excess of 90,000. To this objection it may be said as to Davidson County, that the Legislature may have found as a reason for its exclusion, that it was covered by turnpikes built and controlled by private chartered companies, and in the matter of Shelby County, that the public has already perfected a network of good roads, under a system entirely satisfactory."

This suggestion of a reason for the classification is not based upon anything that is found in the record, or upon anything of which the Court can take judicial notice. *Moreover, it is not the reason upon which the classification of the statute is based.* The statute is based upon a classification according to *population*—a matter that is wholly arbitrary and has no connection that can be conceived of with the subject matter of the legislation that would justify a classification of counties along that line. Had the act been based upon a classification having reference to the suggestion of the Court, then it might possibly have been sustained, as having been based upon a reasonable and not an arbitrary classification. The basis of classification contained in the Act, to-wit, *population*, and the basis of classification suggested in the opinion of the Court, are in no wise related to each other. The Act based upon one is arbitrary. If it had been based upon the other, and had otherwise been reasonable, it might very well have been sustained.

The two classifications would not necessarily have embraced the same county or counties.

But even if the suggestion made as to Davidson and Shelby Counties, as a reason for this discriminative statute, be sufficient reason for their exclusion, what reason could exist as to the other ninety-three counties of the State? The Court has not suggested any.

The rule has sometimes been stated as though it were sufficient if the Legislature treated all that were embraced in a class in the same manner. But this principle underlies that proposition —that the class itself must be a reasonable one and must embrace all persons who come, *not merely within the class,* but *within the situation and circumstances which constitute the reason for and the basis of the classification.* And further, the reason for the classification must have *due regard to the character of the legislation.* Or, as was said by Mr. Justice Brewer in the Ellis case, *supra,* a "reasonable and just relation to the act in respect to which the classification is proposed."

**See Harbison vs. Knoxville Iron Co , 103 Tenn., 423. State Ex. Rel. vs. Schlitz Brewing Co., 104 Tenn., 719.**

While the principles involved were correctly stated in this latter case, the application of the rule in construing the anti-trust Act of Tennessee, which is identical with that of Illinois, has been disapproved in a recent decision of this Court.

**Connelly vs. Union Sewer Pipe Co., 184 U. S., 570. 46 Lawyer's Edition, 679.**

But it is said that this Act may be sustained upon the theory that it is open at both ends, and that all of the counties of the State may, by possibility, come within its provisions.

This contention assumes that this is a general Act, applicable to all the counties of the State, or that it may become so applicable. It assumes that all the counties may come to have from 70,000 to 90,000 inhabitants. Looking to the census of 1900, a copy of which is printed at Appendix C to this brief, it will be seen that Davidson County had, under that census, a population of 122,815, and Shelby County a population of 153,557. It has not been sug-

gested how these counties are to get within the classification by reducing their populations below 90,000. Even if we concede that the smaller counties—some of which had a population of only a little over 3,000—might, in the course of time, reach the minimum of 70,000, still it is difficult to conceive how the large counties might reasonably be expected to reduce their population below the maximum limit of 90,000. Nothing short of earthquake, or pestilence, or war, or other most extraordinary occurrence, could bring about this result. It may be suggested that these counties might be divided, but Davidson County has a city—Nashville—with a population of 80,865; and Shelby County a city—Memphis—of 102,320 population, according to the census of 1900, and any division of these counties that would reduce their population below 90,000 would necessitate a division of these cities. Is a classification based upon such improbabilities a natural and reasonable one? Does it not afford an extreme instance of arbitrary and capricious classification?

The opinion of the Supreme Court of Tennessee in this case, stands out in bold contrast with the former opinions of that Court. No Court has with a freer hand examined into the reasonableness of classifications than the Supreme Court of Tennessee, as will be seen by an examination of the following cases:

**Morgan vs. Reed, 2 Head, 275.**
**Memphis vs. Fisher, 9 Baxter, 239.**
**Brown vs. Haywood, 4 Heisk., 360.**
**Wally vs. Kennedy, 2 Yerg., 554.**
**Bank vs. Cooper, 2 Yerg., 599.**
**Budd vs. State, 3 Hump., 492.**
**McKinney vs. Hotel Co., 13 Heisk., 104.**
**Daley vs. State, 13 Lea, 232.**
**Burkholtz vs. State, 16 Lea, 72.**
**Woodward vs. Bryan, 14 Lea, 522.**
**Neeley vs. State, 4 Lea, 316.**
**Green vs. State, 15 Lea, 708.**
**Ragio vs. State, 86 Tenn., 272.**
**Pope vs. Phifer, 3 Heisk., 683, 702.**

The above cases are reviewed in the leading case of

**Stratton Claimants vs. Morris Claimants, 89 Tenn., pp. 529, 534.**

There may be added to the above list the cases of:

**Halston vs. State, 12 Lea, 368.**
**R. R. vs. Stoval, 12 Heisk., 2.**
**Roane County vs. Burnett, 6 Heisk., 186.**
**Sutton vs. State, 96 Tenn., 696, 710.**
**Bank vs. Devine Grocery Co., 97 Tenn., 609.**
**Bacon vs. Davidson County, 104 Tenn., 317.**

In all of the above cases, the Supreme Court of the State inquired into the classifications, found that they were not natural and reasonable, and for that reason declared the statutes involved absolutely void.

The case of *Burkholtz vs. State, 16 Lea, 72,* is directly in point. It was held in that case that classification by population of counties had no reasonable relation to the matter of the legislation, and for that reason the statute was declared void.

The case of *Woodward vs. Bryan, supra,* is likewise a case in which classification by population of counties was held vicious class legislation.

The cases cited in support of the opinion of the Court fall short of sustaining the Court's decision. That of *Cook vs. State, 90 Tenn., 407,* sustaining the election laws of Tennessee, based upon a classification of counties by population, was correctly decided, though the Court in that case did not go into the question of classification to any considerable extent. There are, however, abundant reasons for the enactment of more stringent election laws for the larger counties of the State, containing the large cities and centers of population, than are required for the agricultural and sparsely settled counties. Corruption in elections prevails to a larger extent in cities and other centers of population than in the agricultural districts. This was a sufficient reason, though no reason was assigned by the Court, for sustaining the classification in that case.

In the case of *Peterson vs. State, 104 Tenn., 127,* likewise cited in support of the Court's opinion, the Court sustained a no-fence law, which by its terms applied only to counties having a population of 59,000 or more. The Court found and in its opinion

states abundant reasons for sustaining such legislation in the larger counties of the State.

The case of *State, ex rel., vs. Schlitz Brewing Co., 104 Tenn., 715,* may be dismissed by the statement that this Court, passing upon an identical statute of the State of Illinois, has held that the Supreme Court of Tennessee was in error.

**Connelly vs. Union Sewer Pipe Co., 184 U. S., 570 46 Lawyer's Edition, p. 679.**

The case of *Luehrman vs. Taxing Dist., 2 Lea, 435,* involved a statute authorizing the incorporation of municipalities, and has no application whatever to a statute of the character of the one under consideration. The State undoubtedly has the power to create or to abolish municipal corporations, either singly or in classes, as they are mere arms of the State government. The distinction between a case that deals with municipal corporations as such and a case like the one under consideration, where the municipalities or counties are simply used as a unit of classification in dealing with the citizens, is manifest.

The case of *Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283,* is much relied upon in the opinion of the Court, but the opinion in that case discloses a classification based upon just reasons and made along proper lines, and is entirely in harmony with the principles upon which class legislation is sustained, as was held in *Connelly vs. Union Sewer Pipe Co., supra.*

It is noticeable that in none of the cases was the classification of a character that selected intermediate counties, leaving larger counties, as well as smaller ones, excluded from the class.

The classification in the Cook case and the Peterson case, *supra,* above referred to, embraces all of the larger counties from the minimum limit up. Other counties, having a smaller population, might by natural growth get into such a class. Such a classification, based upon sufficient reasons and adjusted along proper lines, may be very well sustained, as was done in those cases. But the statute under consideration is of such a character that it excludes the larger as well as the smaller counties, and requires that the larger counties shall lose from 30,000 to 80,000 popula-

tion, and in one county the division of a large city, in order to come within the classification.

If the number of the population of the county was a sufficient reason for applying this legislation to Knox County, what reason would exclude the larger counties from at once entering the class? The conclusion seems to be inevitable that this statute is vicious class legislation. It is not that due process of law required by the 14th Amendment. This objection vitiates the whole of the statute.

Does this statute deprive the Relators of liberty or property, within the meaning of the 14th Amendment?

The Relators are citizens of the county, as well as officers, and subject to the burdens of taxation imposed by statute upon the labor and property of the county. The question whether an office and its emoluments are property, within the meaning of that clause of the 14th Amendment which forbids the State to deprive any person of life, liberty or property, without due process of law, is one that has been several times before this Court. Whether the right to hold office and receive the emoluments thereof constitute "liberty" of the citizen, within the purview of said clause, does not seem to have been heretofore considered, so far as the writer of this brief has been able to ascertain.

It may be conceded that in a direct controversy between the State and its officers, the State has the power, in the absence of constitutional restrictions, to abolish an office, and deprive the incumbent of any future salary or emoluments. The controversy in this case, however, is not between the State and the Relators, for the State itself is the complaining party. The contest is between two sets of officers — the Legislature having undertaken to substitute one set for the other, and to transfer the right to the emoluments of the office, which still exists if the Act is void, from incumbents elected under the law by the County Court, to another set appointed by virtue of an unconstitutional statute.

The terms "property" and "liberty" as used in the 14th Amendment are not to be construed in their strict technical sense, in view of the history and objects of that amendment. Certainly

there is something in the nature of property in the enjoyment of office and its emoluments. There is something of liberty in the right to hold office and enjoy its emoluments. It is a worthy ambition in the citizen to aspire to office. It requires the expenditure of effort, labor and money to secure the qualifications necessary to hold and efficiently perform the duties of office. It likewise requires the expenditure of effort and money to make the contest for office. Men are prone to make greater sacrifices to get office, oftentimes, than to get money. In the view of many, office is a more valuable possession than money. Unpleasant conditions are often confronted in securing office.

Can it be justly said, in view of these conditions and considerations, that one who has been honored by public office, and thereby become entitled to its emoluments, has secured nothing of value which is protected as "property" or "liberty" under the 14th Amendment?

Whatever may be said of the right of the State to abolish and remove its officers in the exercise of its necessary power, can such right be invoked in justification of the act of the Legislature, or of any agent created by the Legislature, transferring a public office, with its emoluments, from a citizen who has been legally elected to it, to another citizen who has no claim to the office, other than that of a statute which violates the Constitution? The office still exists and the right of the incumbent to receive its emoluments remains unimpaired, if the abolishing statute violates the Constitution. Is not an existing office and a continuing right to its emoluments "property" or "liberty"?

In this connection, and with a view to ascertaining the correct meaning and intent of the words "liberty" and "property," it will not be inappropriate to refer to the history and objects of the 14th Amendment.

It is familiar learning that the first ten amendments to the Constitution were proposed by the first Congress, in fulfillment of pledges made to obviate objections to the original instrument, and secure its ratification by the States. These amendments have been not inaptly called the "Federal Bill of Rights." They

were the outgrowth of the jealousy of federal power, and of the apprehension of dangers from its abuse, entertained by the founders of our government.

These ten amendments prescribe limitations upon the powers of the General Government, but not upon the powers of the States.

The 11th and 12th Amendments, ratified in 1798 and 1804 respectively, had the same general tendency—to fortify the States against the dangers apprehended from the abuse of federal power.

With the 13th Amendment begins a new era in constitutional history. That amendment confirms the abolition of slavery.

But the 13th Amendment had not conferred the rights of citizenship upon the emancipated slaves. The immediate occasion of the 14th Amendment was to confer upon the colored race the rights of citizenship, and protect them in their enjoyment of freedom.

While this was the special object of this amendment, it likewise possesses the power and the virtue to protect citizens—white or black—in the enjoyment of their rights. This amendment was retroactive and self-executing, and annulled all constitutions and laws of the States in conflict with its provisions.

**Kaukauna etc. Co. vs. Green Bay etc. Co., 142 U. S., 254.**
**Davis vs. Burk, 179 U. S., 399.**

It was leveled against State, not individual, action.

**Va. vs. Reeves, 100 U. S., 319.**
**Water Works vs. Sugar Co., 125 U. S., 118.**

Its limitations are upon the powers of the States, and forbids action in conflict with its provisions by any of the agencies through which the States act.

**R. R. Co. vs. Chicago, 166 U. S., 226.**

Mr. Pomeroy, writing while this amendment was under debate, said: "It would give the nation complete power to protect its citizens against local injustice and oppression,—the power which it does not now adequately possess, but which, beyond all doubt, should be conferred upon it. Nor would it interfere with

any of the rights, privileges or functions which properly belong to the State."

**Brannon on the 14th Amendment, p. 9.**

The glowing words of Senator Sumner ought not to be omitted in this connection. Speaking of the 14th Amendment, he said: "These are no vain words. Within the sphere of their influence no person can be created, no person can be born, with civil or political privileges not equally enjoyed by all his fellow-citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble, or black; he may be of Caucasian, Jewish, Indian, or Ethiopian race; he may be of French, German, English, or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black; nor is he Caucasian, Jew, Indian or Ethiopian; nor is he French, German, English or Irish. He is man, the equal of his fellow-men. He is one of the children of the State, which, like an impartial parent, regards all its offspring with equal care. To some it may justly allot higher duties according to higher capacities; but it welcomes all to its equal hospitable board. The State, imitating the Divine Justice, is no respecter of persons."

The question whether the State has deprived a citizen of life, liberty or property, without due process of law, in violation of this amendment, is one that this Court always decides for itself, without reference to what may have been the determination by the State Courts.

**Cohen vs. Va., 6 Wheaton, 264.**
**Ableman vs. Booth, 21 Howard, 506.**
**Tarbeles Case, 13 Wallace, 297.**

It has been stated of this amendment that it protects all of the rights insured in the Declaration of Independence, including the rights of life, liberty and the "pursuit of happiness."

In view of this history and consideration of the amendment, does it afford protection to the claimant of an existing office and

its unimpaired emoluments, under the clause relating to liberty and property?

The question has been suggested whether it would protect reputation, though not decided. The matter involved in this case is of a more tangible nature than reputation.

A distinguishing feature between this case and the cases relating to office, heretofore passed upon by this Court, will be found in the fact that the attack made most of in this case is upon the validity of the statute, while the attack in the cases that we are about to review was upon the procedure of the Courts of the State. If the statute is void, the offices still exist with unimpaired right to their emoluments.

This Court has held with uniformity that it will rarely disturb the decision of a State Court, holding that a proceeding in the State Courts, had in conformity with the Constitution and laws of a State, and so declared by the Court of last resort of the State, upon the ground that it is in violation of the due process clause of the 14th Amendment. The decision of the State Courts in that class of cases is well-nigh conclusive in this Court.

It will be found on examination that most, if not all of the cases on this subject, heretofore passed upon, have been of this latter class.

The case of *Boyd vs. Nebraska, 143 U. S., 135; 36 Lawyer's Ed., 103,* was a contest over the office of Governor of that State, by a proceeding in the nature of *quo warranto.* The action was brought by Thayer against Boyd, to oust him from the office of Governor. It was insisted that Boyd was not a citizen of the United States, and therefore ineligible to the office of Governor, and incapable of holding it. The Supreme Court of the State pronounced judgment of ouster against Boyd, from which he prosecuted writ of error. This Court entertained the case, and reversed the judgment of the Supreme Court of Nebraska. The opinion of the Court was delivered by Chief Justice Fuller. This case seems to settle the question that this Court will entertain a case involving a contest over an office, for that was the only matter in controversy, and seems to settle the proposition that an

office is such a thing of value as is contemplated by the 14th Amendment. It is true that the decision of the question of whether Boyd was a citizen of the United States was incidentally involved and invoked in aid of the jurisdiction of the Court in that case, but unless the office there involved was something that was recognized as being entitled to protection under the 14th Amendment, there could have been no Federal question to sustain the jurisdiction of this Court. The office was the whole matter of controversy. This is made clear by the dissenting opinion of Mr. Justice Field, who denied the right of the Court to entertain jurisdiction of a contest over the governorship of a State, however that question may be decided by the State Courts. Unless the office was recognized as a thing of value within the 14th Amendment, then nothing of value was involved and the case presented was a "moot case."

It may be said that this contest was over the office of Governor, but the reasons of public policy against entertaining a contest of that sort are stronger than the reasons against entertaining a contest over minor offices. This Court would have no power to enforce its judgment in a contest over the office of Governor. It has abundant power to enforce its judgment in decisions over minor offices.

In *Foster vs. Kansas, 112 U. S., 201, 28 Lawyer's Ed., 629,* the Supreme Court of Kansas had, in *quo warranto* proceedings, ousted the plaintiff Foster from the office of County Attorney of Salene County, and there was presented a motion to dismiss, as well as one to affirm. This Court overruled the motion to dismiss, saying: "As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the Court, we have jurisdiction, and the motion to dismiss must be overruled."

However, the case was affirmed on the ground that the proceedings, upon an examination by this Court, showed due process of law. This case is directly in point. In the case at bar, as in the Kansas case, the question raised is as to the constitutionality of the statute, and that was held sufficient to give this Court juris-

diction in a contest over a minor office, such as that involved in this case. That case necessarily recognized that an office is something, whether we call it "liberty" or "property," which is protected by the 14th Amendment to the Constitution. This Court could not otherwise have held that it had jurisdiction of the case.

In *Kennard vs. Louisiana, 92 U. S., 480; 23 Lawyer's Ed., 478,* it appears that Kennard was appointed a Justice of the Supreme Court of Louisiana. Morgan claimed to be entitled to that office and brought suit to settle the title to the same. The Supreme Court of the State decided in favor of Morgan, and Kennard sued out writ of error from this Court on the ground that the judgment had deprived him of his office, without due process of law, in violation of the 14th Amendment. The Court sustained the jurisdiction, but on examination of the proceedings found that there had been due process of law, and therefore affirmed the judgment of the Supreme Court of Louisiana. In that case the contest was over an appointive office. There was no other ground upon which the jurisdiction of this Court could have been sustained, except that the office is something in the nature of property or liberty, which this Court has the power to protect under the 14th Amendment. The Court could not have assumed jurisdiction and examined the question, and decided it, upon any other hypothesis.

In *Wilson vs. N. C., 169 U. S., 586; 42 Lawyer's Ed., 865,* the contest was over the office of Railroad Commissioner, an appointive office. The Court entertained the jurisdiction, saying: "The only question for us to review is whether the State, through the action of its governor and judiciary, has deprived plaintiff in error of his property, without due process of law, or denied him the equal protection of the laws." And again, "The procedure provided by a valid State law for the purpose of changing the incumbent of a State office, will not in general involve any question for review by this Court."

The Court did examine that case, and dismissed the writ of error, saying: "Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really

exist—that there is no fair color for claiming his rights under the Federal Constitution have been violated, either by depriving him of his property, without due process of law, or by denying him the equal protection of the laws."

The Court held that the proceedings by which Wilson had been removed and Caldwell appointed in his stead, were sufficient for that purpose. There is no intimation in the opinion that an office was not such "property" or "liberty" as would be protected by the 14th Amendment.

It is to be observed of this case likewise, as distinguishing it from the case at bar, that it was not a statute of the State that was assailed, but the proceedings under a statute whose validity was not attacked.

The latest case upon this subject is that of *Taylor vs. Beckham, 178 U. S., 548; 44 Lawyer's Ed., 1187.* This was a contest by *quo warranto* over the office of Governor. The petition was dismissed by the Supreme Court of the State and writ of error prosecuted. The writ of error was dismissed.—three members of the Court dissenting.

There was no assault made in that case upon the statutes of the State. The Chief Justice, delivering the opinion of the majority, said: "We do not understand the statute to be assailed as in any manner obnoxious to constitutional objection, but that plaintiffs in error complain of the action of the General Assembly under the statute and the judgment of the State Courts declining to disturb that action. * * * We repeat, then, that the contention is that, although the statue furnished due process of law, the General Assembly, in administering the statute, denied it."

This is a distinguishing feature between that case and the one at bar. The contest in the case at bar is solely over the constitutionality of the statute.

Again it is said: "It is clear that the judgment of the Court of Appeals in declining to go behind a tribunal vested by the State Constitution and laws with the ultimate determination of the right to these offices, denied no right secured by the 14th Amendment."

Nowhere in this opinion of the majority is it stated that this

Court will not, as it had done in former cases, entertain a contest over an election, as appears from the following quotation from the opinion: "And where controversies over the election of State officers have reached the State Courts in the manner provided by law, and been there determined in accordance with the State constitution and laws, the case must necessarily be *rare* in which the interference of this Court can be invoked."

Again, quoting the language of Mr. Justice Peckham, in *Wilson vs. N. C., supra,* it is said: "The procedure provided by a vaild State law for the purpose of changing an incumbent of a State office will not, *in general,* involve any question for review by this Court. A law of that kind itself should provide for the carrying out and enforcement of the policy of the State with reference to its political and internal administration, and a decision of the State Court in regard to its construction and validity will *generally* be conclusive here."

The majority opinion in that case does not determine that where, in a contest over an office, there is a question as to the constitutionality of the statute involved, that it will not entertain jurisdiction. It does not decide that this Court will not entertain jurisdiction in any case, where the subject of controversy is an office, even where the question of due process arises upon the proceedings of the State Court, which are rarely disturbed by this Court. The intimation is clearly made that there may arise cases where the Court would assume and entertain such jurisdiction. It would be, as suggested by one of the dissenting Justices in that case, a strange construction of the 14th Amendment, if it were held that a party would be protected in the right to his farm, worth $100, or to his mule, and at the same time would not be protected in the enjoyment of an office and its emoluments, which he had, by honorable effort and expenditure of money, secured.

The Court at any rate has not decided that the right to enjoy an office and to receive its emoluments is not a part of the "liberty" of the citizens of the Republic. It has not decided that the protection of the citizen in "the pursuit of happiness" afforded by that amendment is not a thing that is beyond the pale of its oper-

ation. Especially has it not been decided that the incumbent of an existing office, whose right to its emoluments has not been impaired by any valid statute, will not be protected under this Amendment. It would seem that if any case could be presented where this Court would entertain jurisdiction to protect a claimant in the enjoyment of an office and its emoluments, as against an intruder under color of an unconstitutional statute, that case is presented by this record.

But is not the right to hold office and enjoy its emoluments a part of the "liberty" of the citizen within the meaning of the 14th Amendment?

In *Allegeyer vs. La., 165 U. S., 289; 40 Lawyer's Ed., 835,* Mr. Justice Peckham, delivering the opinion of the Court, said: "The liberty mentioned in the amendment, means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live, to work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose enter into all contracts which may be proper, necessary and essential for carrying out to a successful conclusion the purpose above mentioned."

He quotes with approval the language of Mr. Justice Bradley from *Butcher's Union etc. Co. vs. Crescent City etc. Co., 111 U. S., 46; 28 Lawyer's Edition, 585,* as follows: "The right to follow any of the common avocations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness,' which commenced with the fundamental proposition that all men are created equal, that they are endowed by their Creator with certain inalienable rights, and among these are life, liberty and the pursuit of happiness. This right is a large ingredient of the civil liberty of the citizen. * * * I hold that liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States. * * * But if it does not abridge the privileges and immunities of a citizen of

the United States, or prohibit him from pursuing his chosen calling, and giving to others the exclusive right to pursue it, it certainly does deprive him to a certain extent of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen."

It would seem that this definition of liberty is broad enough to embrace the right of the citizen to seek, secure and hold public office, and enjoy its emoluments. Can it be justly said that a citizen may pursue a private calling and not a public calling, as a matter of right under the Constitution of the United States, that he may secure his livelihood by pursuing a private calling, and may not do the same thing by pursuing a public calling? As a matter of sound public policy, is it not to the best interests of the public, under a government like ours, that permits every citizen to fill any office from the highest to the lowest, that all citizens should be encouraged to equip themselves for public office and to worthily seek it? It is a fact well known, that some men propose for themselves a public career and devote their energies and efforts and spend their means for that worthy end. Shall this sort of thing be discouraged by holding that public office is nothing that partakes of either liberty or property of a citizen?

While it may be conceded that there is nothing in the right to hold office or enjoy its emoluments, either as property or liberty, when the contest is directly between the incumbent of an office and the right of the State to abolish the office, and thereby relieve the public of the burden of its salary, still there is a clear distinction between that case and the one at bar.

In the case at bar, the contest is not between the State and its official, but between two sets of officials claiming the right to hold the same office, or rather to perform the same duties and enjoy the salary or compensation that the public pays. The decisions of the Supreme Court of Tennessee recognize a clear distinction between these two classes of cases. That Court has distinctly denied the right of the Legislature, by the repeal of a statute and the enactment of a new statute, to transfer an office,

its duties and emoluments, from one person to another. That Court has held such a statute unconstitutional in the case of *State, ex rel., vs. Leonard, 86 Tenn., 407.*

And that case is recognized and approved in the subsequent cases, in which it is held that the Legislature may, as between the incumbent and the State, abolish an office, and thereby remove the official and defeat his claim to salary.

**The Judges Cases, 102 Tenn., 544.**
**State, Ex. Rel. vs. Lindsay, 103 Tenn., 635-6.**

There is no substantial ground of distinction between the case at bar and the Leonard case, above cited. The effect of the legislation under consideration, was to substitute one set of officials for another set of officials, to perform the same public duties. The mere change of name or consolidation of departments makes no substantial ground for distinction. The potent fact remains that the Legislature has undertaken by repeal of a statute or statutes, under which certain officials were elected and were performing their duties and drawing compensation, to remove those officers and defeat their claim to salary or compensation, and to bestow those duties upon other individuals, and that, too, by a special, discriminatory statute that does not constitute due process of law.

The statute under consideration not only deprives Relators of office, but imposes burdens of taxation in labor and money upon them, and all other citizens of Knox County, that are not borne in an equal degree by the citizens of any other county of the State

It may be said that the offices and the revenues derived therefrom involved in this case, are too inconsiderable to demand the serious attention of this Court. Upon this point Mr. Gutherie says: "The violation of a constitutional right should never be measured or met by such a plea. It is said that counsel once attempted to argue before Chief Justice Marshall, in the particular instance before the Court, that the invasion of a constitutional right was slight, but he was sternly reminded that the case involved the Constitution of the United States, and that the degree or the extent of the invasion had no bearing upon the point.

When a constitutional right is invaded, we are not bound to stand silent, so long as moderation is practiced. There can be no greater political blindness, no more dangerous policy, than to sanction the infringement of constitutional rights because the particular instance is in itself apparently harmless, or seems expedient. Admit the wedge ever so slightly, and there is nothing to prevent its being driven home. We are not compelled to wait until the unconstitutional measure becomes ruinous confiscation, or an intolerable interference with constitutional liberties. In respect to constitutional guarantees, we have the right to expect absolute security and protection, and the Courts are under a duty to enforce the constitutional provisions, guaranteeing our rights, wholly irrespective of the degree of the infringement. Present convenience, however great, present exigencies, however tempting, can never justify the slightest disregard of any provision of a constitution. It is ever the moderate or light evasion of constitutional rights that are most dangerous."

In *Boyd vs. U. S., 116 U. S., 616,* Mr. Justice Bradley used this language: "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of one-half their efficiency and leads to the gradual deprivation of the right as if it existed more in sound than in substance. It is the duty of the Courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

In the introduction to the letters of Junius are found these wise words: "Let me exhort and conjure you never to suffer an invasion of your Constitution, however minute the instance may appear, to pass without a determined, persevering resistance. One precedent creates another. They soon accumulate and constitute law. What yesterday was fact, to-day is doctrine. Extremities

are supposed to justify the most dangerous measures, and where they do not suit exactly, the defect is supplied by analogy. Be assured that the laws which protect us in our rights grow out of the Constitution, and that they must fall or flourish with it. This is not the cause of faction, or party, or of any individual, but the common interest of every man in Britain."

In *Sentell vs. R. R. Co., 166 U. S., 698* this Court gave grave and careful consideration to constitutional questions arising under the 14th Amendment, involving only the claim for the killing of a dog.

The case at bar is one that appeals strongly for the gravest consideration of this Court. The appeal is in behalf of and for the protection of minorities against the tyranny of majorities. Should the Court close the door against this appeal, then the Legislature of Tennessee and of other States as well, may, as often as it chooses, transfer the offices of any county in the State, whose officials are not of that political faith which agrees with the majority of the Legislature, to such persons as are of the same political faith with the majority. And this may be done by the majority, without accepting for themselves the same rules or provisions of law that they apply to the minority. Ninety-five counties pass a law for Knox County, not one of which is willing to accept the same law for its own citizens.

In this case the most plausible reason that can be suggested for the legislative action under consideration, is that Knox County, through its County Court, had elected officers that did not agree politically with the representatives of the majority of the counties in the State, and that as a consequence the majority, not accepting for themselves the law that they prescribed for Knox County, undertook to remove those officials, and by transferring the appointment to the Governor, to secure the filling of the local offices in Knox County by persons who agree politically with the majority in the Legislature and with the Governor. This precedent, if it can be sustained, as it has been by the Supreme Court of Tennessee, will be followed by the most disastrous and demoralizing consequences in the public service.

The people of counties obnoxious to the majority of the Legislature will be deprived of their right to elect their own local officials or to control their local affairs, and thereby deprived of the power to remedy or correct mal-administration of their local concerns. The appointment of their local officials will be transferred to the capital of the State, where they cannot be heard, or if heard, not heeded, because of the fact that they are in the minority. Worthy citizens of the minority will be deterred from offering for office, or voting in the elections, and thereby induced to abandon that salutary interest in public affairs which is so necessary to good government, because of the knowledge that the choice of the people will be defeated by arbitrary and oppressive legislative action, such as has been resorted to in this case. It may be said the Governor's appointees are to hold only until the next election. But the next election occurs just before the next session of the General Assembly, and that body may repeat its performance if the people should elect obnoxious officials.

(2) *The statute Chapter 8, Session Acts of 1901, denies to Relators and to the citizens of Knox County the equal protection of the laws, in contravention of the last clause of the 14th Amendment to the Federal Constitution.*

That clause forbids the State to deny to any person within its jurisdiction the equal protection of the laws.

The character of the statute under consideration has already been discussed, and need not, in this connection, be further noticed, except to say that it not only denies to the Relators the right to hold public office and to receive its emoluments, but prescribes for all the citizens of Knox County an arbitrary and discriminative rule of taxation for road purposes, and of criminal liability, applicable to all citizens of Knox County, but not applicable to any of the other ninety-five counties of the State. It is without question an unequal, arbitrary and discriminative statute.

Does it deny to the Relators and the people of Knox County the equal protection of the laws, within the meaning of that clause of the 14th Amendment above quoted?

In the consideration of this amendment, it is to be observed that the clauses preceding this particular one, protect life, liberty, property, privileges and immunities of the citizen. The framers of this section did not seem to have thought that this was enough, and added the clause quoted, securing to all persons, whether citizens or not, the equal protection of the laws. This clause must be held to mean something more and to cover something beyond what was meant and covered by the preceding clauses, relating to life, liberty, property, privileges and immunities.

The 14th Amendment was framed by the ablest lawyers, upon the most mature consideration, with infinite care, and passed through the fire of a fierce discussion before its adoption. Senator Edmunds, who was a member of the Senate when the 14th Amendment was discussed and recommended by that body, says:

"There was no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted. There was no conceivable posture of affairs to the people who had it in hand which was not considered."

**Guthrie on 14th Amendment, p. 25.**

We must therefore find in this last clause of the 14th Amendment something more than is to be found in the preceding clauses of that section. It means something. If it does no more than to protect life, liberty, property, privileges or immunities of the citizens, certainly a very broad field, then it means nothing, and adds nothing to the efficiency of the 14th Amendment.

What then is the effect of this guaranty of the equal protection of the laws? What rights not already sufficiently protected by the preceding clauses are protected by this particular clause? It may be that it would have been efficient to protect the rights of life, liberty, property and privileges and immunities, even if the preceding clauses had not existed. But it would not have been added for these purposes alone by the able and careful draftsmen of this section. It must have the effect to protect something beyond the things named in the preceding clauses. What are those things? Is it not the right to have just and equal laws,

not only as to life, liberty, etc., but likewise as to such important matters as local self-government, the enjoyment of one's reputation unimpaired, and if not already protected by the preceding clause, the right to hold office and enjoy its emoluments, which, however, less tangible than the rights of life, liberty and property, are not less essential to the welfare of the citizen and the community? Every citizen is interested in just and equal laws. It is the right of every citizen and every community to be governed by laws that are not arbitrary and discriminating, as against themselves and in favor of other communities within the same jurisdiction. It is this right which is secured by the clause of the 14th Amendment above quoted, or it is a meaningless clause that adds nothing to the effect of the preceding clauses. Just and equal laws are the essence of liberty. The strongest guaranty of good government is the requirement that the whole community shall accept the same laws that it prescribes for its feeblest member.

Speaking of this clause of the 14th Amendment, Mr. Justice Bradley, in *Bell's Gap R. R. Co. vs. Penn., 134 U. S., 232; 33 Lawyer's Ed., 892*, among other things says: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unusual to the practices of our government, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases."

In *Yickwo vs. Hopkins, 118 U. S., 356; 30 Lawyer's Ed., 220*, Mr. Justice Matthews, speaking for this Court, said: "When we consider the nature and theory of our institutions and government, and principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. The first official action in this connection, declaring the foundation of government, is in these words, we hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain inalienable rights, that among these are life, liberty and

the pursuit of happiness, but while these declarations of principles may not have the force of organic law, or be made the basis of judicial decision, as to the limits of right and justice, and while in all things reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter, of which the former is the thought and the spirit, and it is always expected to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions necessary to secure that equality of rights which is the foundation of free government."

In *Cotting vs. Goddard, supra,* Mr. Justice Brewer says: "It has been more than once said judicially that one of the principles upon which this government was founded is that of equality of right. It is emphasized in that clause of the 14th Amendment which prohibits any State to deny to any individual the equal protection of the laws."

It was said in the *Slaughter House Cases* that this clause of the amendment was leveled against invidious distinctions in State laws.

**16 Wallace, 36.**

In *Yickwo vs. Hopkins, supra,* it was said that the equal protection of the laws is "the pledge of the protection of equal laws."

This question has received an elaborate consideration in the recent case of *Connelly vs. Union Sewer Pipe Co., 184 U. S., 570; 46 Lawyer's Ed., 679.*

In an early case *(13 Federal Reporter, 740),* Judge Field, speaking of the 14th Amendment, said: "Its effect in preserving free institutions, and preventing harsh and oppressive State legislation, can hardly be overstated.

"When burdens are placed upon particular classes of individuals, while the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting. But a burdensome law operating equally upon all will soon create a movement for its repeal. With

the Amendment enforced, a bad or oppressive State law will not long be left on any statute book.

"The argument that a limitation must be given to the scope of this Amendment because of the circumstances of its origin, is without force. Its authors, seeing how possible it was for the States to oppress without relief from the Federal Government, placed in the Constitution an interdict upon their action, which makes lasting oppression of any kind by them under the form of law impossible.

"The Amendment prohibiting slavery and involuntary servitude, except as a punishment for crime, had its origin in the previous existence of African slavery. But the generality of its language makes its prohibition apply to slavery of white men as well as that of black men; and also to serfage, vassalage, villenage, peonage, and every other form of compulsory labor to minister to the pleasure, caprice or power of others."

To illustrate the hardship and danger of a denial by this Court of protection to these Relators, and through them to the complaints of all minorities against oppressive and tryannical action or measures in the State governments, we submit the following:

Suppose the existence of a State having seventy-five counties, fifty of which are democratic and twenty-five republican. Suppose a large majority of democratic voters in the State-at-large, who elect the Governor and the Judges of the higher courts and the Legislature, a majority of the latter body being of course of the democratic persuasion. Suppose that the majority in the Legislature determine to oust the republican local officials in the twenty-five republican counties, by such laws as the one enacted in this case, and transfer the power to appoint the local officers of such counties to the democratic Governor. What rights have the minority in such State, under such conditions, if a statute such as that now being considered can be maintained as free from objection for violation of the 14th Amendment? It may be said that appeal lies to the Courts of the State, but in the case supposed, the Court of last resort is of the same political tendency as

the Governor, who is constituted the appointing power, and the Legislature, which has enacted the arbitrary and discriminating statutes, which they refuse to accept for their own constituents. If not adopted to limit this sort of State action and protect the citizens of the United States against this sort of tyranny, for what purpose was the 14th Amendment promulgated?

"It is certainly (said Justice Field, in *Ah Kow vs. Nunan, 5 Sawyer, 552*) something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction, and that every blow aimed at any of them, however humble, coming from whatever quarter it may, is caught upon the broad shield of our blessed Constitution and our equal laws."

"It (14th Amendment) stands in the Constitution as a personal shield against all unequal, partial legislation by States and injustice which follows from it, whether directed against the most humble or the most ~~powerful~~ powerful, against the despised laborer of China, or the envied master of millions."

**Yickwo vs. Hopkins, supra.**

Leo. W. Pickle.

J. W. GREEN,
PICKLE & TURNER,
*Sols. for Complainants.*

## *APPENDIX "A."*

### Chapter 8, Session Acts of 1901.

"An Act to create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State in counties having a population of not less than 70,000 nor more than 90,000, under the Federal Census of the year 1900 or any subsequent Federal Census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this Act.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That in all counties of this State, having a population of not less than 70,000 nor more than 90,000 under the Federal Census for the year 1900, or any subsequent Federal Census, there shall be, and hereby is created a Board of Public Road Commissioners. Said Board shall be composed of three (3) members, citizens of the county, to be chosen as hereinafter set out. As soon as this Act shall take effect, the Governor shall appoint three (3) Commissioners, who shall constitute the first Board of Public Road Commissioners, and in appointing said Commissioners the Governor shall designate one of said appointees as Superintendent of Public Roads, and the others as associate members of said Road Commission. The Commissioners so appointed by the Governor shall hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election, the candidates to be designated on the official ballot by the titles herein declared. * * * "

"Section 3. * * * All male inhabitants between the ages of eighteen (18) and fifty (50) years shall be subject to road work, unless exempted by the County Court, and anyone subject to road work who shall wilfully fail or refuse to work the number of days fixed by the County Court after he has been notified as aforesaid, shall be guilty of a misdemeanor, and the contractor shall report his name to the supervisor of the district, who shall have the delinquent apprehended and brought before a justice of the peace to answer the charge of a dereliction of duty, provided,

that anyone subject to road work may commute for said labor on or before the first day of the month following the date on which he is notified by paying to the contractor fifty (50) cents a day for the time he may have failed to work. * * * "

"Section 4. Be it further enacted, That the County Court of each county, coming under the provisions of this Act, shall, at the January or April term each year levy a tax upon all property in the districts outside of the corporate limits of incorporated cities and towns, for the purpose of improving dirt roads in the county, which tax shall not be less than ten (10) cents on the one hundred dollars, nor more than twenty-five (25) on the one hundred dollars, and the County Courts in counties having macadam roads shall, at the same term, and in addition to the tax last provided for, levy a tax upon all taxable property of the county of not less than ten (10) cents on the one hundred dollars, nor more than fifteen (15) cents on the one hundred dollars, to be expended by the Commissioners herein provided for.

"First, in repairing and keeping in repair the macadam roads already built; and

"Second, in extending and constructing new macadam roads. The County Court shall also fix the number of days labor required of the road hands, which shall not be less than four (4) nor more than eight (8) days in the year."

## *APPENDIX "B."*

### CONDON vs. MALONEY.

BEARD, J. These are consolidated causes. The first is a proceeding by mandatory injunction, to compel the defendant, Maloney, as County Judge, to examine and approve the bonds of complainants as road commissioners of Knox County, they asserting claim to that office, by virtue of an appointment by the Governor, pursuant to the provisions of an Act of the last session of the Legislature. (Acts 1901, Ch. 8, p. 10.) In their bill, it is alleged, that they had tendered to the defendant, the bonds executed in all respects as required of them by Section 15 of the Act, for his approval as County Judge, and that he had declined to examine or approve them, upon the sole ground assumed by him, that the Act was void for unconstitutionality, and the prayer of the bill is that a mandatory injunction be awarded to require him to discharge the duty of examination and approval as one merely ministerial. In accordance with the prayer, a writ of mandatory injunction was awarded. Subsequently a demurrer, calling in question the right of the complainants to this injunction, and challenging the constitutionality of the Act, was filed, and upon argument overruled. The defendant, declining to make further defense, a final decree was entered, affirming the right of the complainants to the relief sought. From this decree an appeal was prayed and granted.

The second of these causes is a statutory proceeding in the nature of a *quo warranto*, brought after defendants (who are the complainants in the first named cause) had been inducted into office, as the result of the mandatory injunction referred to, on the relation of the removed officials, assailing the title of defendants to the offices of Public Road Commissioners, and seeking reinstatement of the relators. The attack of the relators on the title of the defendants is based on the assumed unconstitutionality of Ch. 8 of the Acts of 1901. Upon demurrer the bill was dismissed, and the relators appealed.

The causes were heard by the Court of Chancery Appeals, and the decree of the Chancellor in each was affirmed. From the decree of affirmance the defendant, Maloney, in the one, and

the relators, in the other of these cases, have prosecuted appeals to this Court.

The questions involved in the two causes are the same, save in the first it is insisted for the defendant, Maloney, that the action of the Chancellor in awarding the mandatory injunction was arbitrary and unauthorized, and this Court is earnestly asked to so pronounce.

Rare as is the use of this extraordinary process, yet the power of the Chancellor to grant it, in a proper case, is recognized in equity practice, and we are not prepared to say that there was here an abuse of discretion.

But if it was conceded the writ should not have been awarded, yet it appears from these records that it was obeyed by the County Judge in the examination and approval of the bonds submitted to him, and the complainants were inducted into office. This being done, the writ spent its force, and a reversal of his decree in that regard could not undo what has been done. This being so, it would be an idle ceremony, even if disapproving the Chancellor's action, to enter such a decree.

This brings us to the more serious questions raised by these appeals.

The Act, the constitutionality of which is challenged by the respective appellants, is entitled "An Act to create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State in counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year 1900, or any subsequent Federal Census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this Act."

It is a well-established canon of constitutional construction, and certainly is now axiomatic in this State, that he who seeks to have a legislative act declared void on the ground that it is violative of the constitution, must be prepared to place his finger upon the clause which vitiates it. For, as was said by Caldwell, J., in *Cole Mfg. Co.* v. *Falls*, 90 Tenn., 468, "all intendments are in favor of the constitutionality of an Act of the Legislature, passed with the forms and ceremonies requisite to give it the force of law. . . . Every reasonable doubt must be solved in favor of the legislative action."

Bearing this rule in mind, we come now to the consideration of the Act in question.

In the first place, it is said that this is vicious class legislation, passed in violation of Article XI., Section 8, and Article I., Section 8, of the State Constitution, and the Fourteenth Amendment to the Federal Constitution. These several sections are so familiar it is not worth while to set them out here.

In *Harbison* v. *Knoxville Iron Co.*, 103 Tenn., 421-431, it is said that the phrase, "by the law of the land," as used in Section 8, Article I. of the State Constitution, is the exact equivalent of the terms, "due process of law," as used in the Federal Constitution, and it is asserted in the argument of the counsel for the appellants, "that whatever is forbidden as vicious class legislation by the State Constitution, is likewise forbidden by the Fourteenth Amendment to the Constitution of the United States."

We will then first refer to one or more of the leading cases, decided by the Supreme Court of the United States, involving the question of legislative classification, and ascertain the rule adopted by that Court.

In *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S., 283, was raised the question of the constitutionality of the inheritance tax law of the State of Illinois. That Act classified successions, and fixed the rate of taxation upon them, in substance as follows: 1. When the beneficial interest to any property or income therefrom should pass to or for the use of a father, mother, husband, wife, child, brother, sister, wife, or widow of the son, etc., in every such case the rate of tax should be one dollar on each one hundred dollars of the market value of the property received by such person; provided, however, that any estate of less value than twenty thousand dollars received by such person, should not be the subject of this tax. 2. When the beneficial interest to any property passed to or for the use of any uncle, aunt, etc., in any such case, the rate of such tax should be two dollars on every one hundred dollars of the market value of such property received by each person in excess of two thousand dollars so received; and (3) in all other cases the rate should be on each one hundred dollars of property received as follows: On all estates of ten thousand dollars or less, three dollars; on all estates of over ten thousand and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars, etc.

This Act was attacked as vicious class legislation, it being insisted that it was necessarily arbitrary, and its provisions as

causing discriminations and creating inequality of burdens of taxation, in violation of the Fourteenth Amendment, which prohibits a State denying to any citizen the equal protection of the laws.

To this contention the Court, speaking through McKenna, Justice, said: "What satisfies this equality has not been, and probably never can be, defined. Generally it has been said that it 'only requires the same means to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' Kentucky Railroad Tax cases, 115 U. S., 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. . . . It may be safely said that the rule prescribes no rigid equality, and permits to the discretion and wisdom of the State a wide latitude as far as interference by this Court is concerned. . . . In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

And so it was, the Court held that the Act did not impinge upon the Fourteenth Amendment, though it relieved absolutely persons who belonged to the first class, and yet came into property of a less value than twenty thousand dollars—while it placed the burden upon all others of that class succeeding to property of greater value than twenty thousand dollars, and not only placed a still heavier burden upon those belonging to the second and third classes, but graduated this burden among those belonging to these classes according to the value of their respective successions. Yet, we think, it might possibly be difficult to assign any satisfactory reason why a person of the first class, receiving an estate of twenty thousand dollars, should pay this inheritance tax, while another person of the same class, receiving a dollar less, should be relieved from it, and so with regard to the discrimination made in the other cases.

Nor did the Court attempt to assign any reason for the difference. On the contrary, it said, "There is . . . no precise application of the rule of reasonableness of classification, and the rule of equity permits many practical inequalities. . . . It only requires that the law . . . shall operate on all alike

under the same circumstances." Thus, in substance, using the language employed in so many of our cases which deal with the two clauses of the State Constitution, in question here.

In *Orient Insurance Co.* v. *Daggs*, 172 U. S., 557, was involved a statute of Missouri, providing that in suits upon policies of insurance against loss by fire, the defendant shall not be permitted to deny that the property insured was worth, at the issuance of the policy, the full amounts covered by the policy; and in case of total loss, that the measure of damages should be the amount at which the property was insured, less depreciation in value between the time of issuing the policy and at the time of the loss, and the burden of proving such depreciation should be on the defendant, etc.

It was objected that this statute was passed in violation of the Fourteenth Amendment of the Federal Constitution, in that it discriminated "as to the subject matter, as to the parties, as to the mode of trial of actions at law and equity, and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate its contracts, compel it to pay damages never sustained, and prevent it from having an investigation upon the trial by due process of law."

The Court, in disposing of this contention, refers to the case of *Magoun* v. *Illinois Trust & Savings Bank, supra*, as containing a late review of the subject, and adds: "We said in that case that the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons, or in their relations. It suffices if it is practical, and is not reviewable *unless palpably arbitrary*." The Court then concludes: "The classification of the Missouri statute is certainly not arbitrary."

Without citing other cases from that Court, it will be sufficient to say, that an examination of the United States Supreme Court Reports will show that the Court not only has failed to declare all legislative classifications to be obnoxious to the amendment in question, but, on the other hand, has recognized many State laws classifying property or persons, in their respective relations, as outside the inhibition of the amendment. The theory upon which this holding rests is thus stated by Fields, Justice: "The greater part of all legislation is special, either in the objects

sought to be attained by it, or in the extent of its application; laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, . . . laws for the irrigation and drainage of particular land, . . . are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment, requiring equal protection of the laws, because it is special in its character. . . . And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed by them, or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, . . . are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and liabilities imposed."

So we are satisfied that this Act does not in any regard infringe the Fourteenth Amendment to the Federal Constitution, as it operates upon all counties in like conditions, with uniformity, and cannot be said to be palpably arbitrary. The same rule of construction that saves it in this regard will protect it from the condemnation of Section 8 of Article I. of the Constitution of the State. For a classification is safe as against this provision, when, as this does, it embraces equally all counties which are now or hereafter may be in like condition. *Stratton* v. *Morris*, 89 Tenn., 534; *Harbison* v. *Knoxville Iron Co.*, 103 Tenn., 747.

Is the Act violative of Article XI., Section 8 of the State Constitution, in that it grants to "one individual, or individuals, rights, privileges, immunities or exemptions, other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of the law."

It applies alike to all "counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year 1900, and subsequent Federal Censuses." By its terms it applies with uniformity to all counties which had the requisite population at the time of the passage of the Act, and to all such as hereafter may fall within its provisions, as indicated by it.

The question of the constitutionality of legislation, providing

for a classification of towns, cities and counties, with a view to the operation of particular statutes, has long since been put at rest by the decisions of this State. Perhaps no statutes have been more stubbornly contested than those at stake in *Luehrman* v. *Taxing District*, 2 Lea, 435, and *Cook* v. *State*, 90 Tenn., 407, yet both provided for classifications, resting for population upon the Federal Census, and both were upheld.

The first of these cases called in question a series of Acts, constituting, however, a system, beginning with the Act repealing the charter of certain municipal corporations (1879, Ch. 10), and ending with the Act to establish Taxing Districts (1879, Ch. 11), and the Act amendatory thereof (1879, Ch. 84); and the second the "Dortch Law," Ch. 24, Ex. Sess., 1890.

But it is said the Acts in controversy in these cases, are to be distinguished from the one at bar in the present case.

We do not think so. We are unable to discover how the case of *Cook* v. *State*, *supra*, can be maintained, and the Act now in question be annulled as capricious and arbitrary. In essentials they are the same, and the one cannot stand while the other falls.

But it is urged that no reason has been assigned for limiting the operation of the Act to counties "having a population of not less than 70,000 and more than 90,000," and thus necessarily excluding the counties of Davidson and Shelby, each having a population, according to the Federal Census, largely in excess of 90,000. To this objection it may be said as to Davidson that the Legislature may have found as a reason for its exclusion, that it was covered by turnpikes built and controlled by private chartered companies, and in the matter of Shelby, that the public has already perfected a network of good roads, under a system entirely satisfactory.

But while the Courts frequently find and assign reason for legislative classification, yet it is by no means uniformly so. And it does not follow, because the reason for the classification is not disclosed in the face of the Act, that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the law-making body, which do not appear upon the face of a statute, and for the Courts to strike it down, because not readily perceptible, might well be criticised as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action.

The true question in each case is, is the classification capricious, unreasonable or arbitrary?

As is said in the opinion of the Court by Caldwell, J., in *State, ex rel.*, v. *Schlitz Brewing Co.*, 104 Tenn., 715, 731: "Class legislation is of two kinds, namely, that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious." The Court tnen refers to the case of *Magoun* v. *Ill. Trust & Savings Bank, supra,* and *Orient Ins. Co.* v. *Daggs, supra,* with approval, and, with regard to classification, embodied from the latter case a sentence already quoted, that "it suffices if it is practical and is not *reviewable unless palpably arbitrary.*"

This is the latest utterance of this Court upon this vexed question, made after a careful collation and consideration of the cases, and we are satisfied of its soundness. Applying this criterion to the statute, we are satisfied that it is not "vicious classification."

But it is said this statute is void because, while general in its terms, yet as a matter of fact only the County of Knox falls within its provisions when passed.

The same objection would and in fact was made in the case of *Lucrhman* v. *Taxing District, supra,* that only the city of Memphis fell within the provisions of the Acts there in question, and in the case of *Cook* v. *State, supra,* that only two counties in the State could avail themselves of the Dortch law, and in *Peterson* v. *State,* 104 Tenn., 127, that the no-fence-law (Ch. 23, Acts 1899) applied only in counties in the State having a population of 59,000 or more by the Federal Census of 1890, etc., but in each case the objection was overruled. These cases were decided after careful deliberation, and we see no occasion to question their absolute correctness. * * *

## *APPENDIX "C."*

The population of the several counties of Tennessee, according to the Census of 1900, was as follows:

| | |
|---|---|
| Anderson | 17,634 |
| Bedford | 23,845 |
| Benton | 11,888 |
| Bledsoe | 6,626 |
| Blount | 19,206 |
| Bradley | 15,759 |
| Campbell | 17,317 |
| Cannon | 12,121 |
| Carroll | 24,050 |
| Carter | 16,688 |
| Cheatham | 10,112 |
| Chester | 9,896 |
| Claiborne | 20,696 |
| Clay | 8,421 |
| Cocke | 19,154 |
| Coffee | 15,574 |
| Crockett | 15,867 |
| Cumberland | 8,311 |
| Davidson | 122,815 |
| Decatur | 10,439 |
| DeKalb | 16,460 |
| Dickson | 18,635 |
| Dyer | 23,776 |
| Fayette | 29,701 |
| Fentress | 6,106 |
| Franklin | 20,392 |
| Gibson | 39,408 |
| Giles | 33,035 |
| Grainger | 15,512 |
| Greene | 30,596 |
| Grundy | 7,802 |
| Hamblen | 12,728 |
| Hamilton | 61,695 |
| Hancock | 11,147 |
| Hardeman | 22,976 |
| Hardin | 19,246 |
| Hawkins | 24,267 |
| Haywood | 25,189 |
| Henderson | 18,117 |
| Henry | 24,208 |
| Hickman | 16,267 |
| Houston | 6,476 |
| Humphreys | 13,398 |
| Jackson | 16,039 |
| James | 5,407 |
| Jefferson | 18,590 |
| Johnson | 10,589 |
| Knox | 74,304 |
| Lake | 7,368 |
| Lauderdale | 21,971 |
| Lawrence | 15,402 |
| Lewis | 4,455 |
| Lincoln | 26,304 |
| Loudon | 10,838 |
| McMinn | 19,163 |
| McNairy | 17,760 |
| Macon | 12,881 |
| Madison | 36,333 |
| Marion | 17,281 |
| Marshall | 18,763 |
| Maury | 42,705 |
| Meigs | 7,491 |
| Monroe | 18,585 |
| Montgomery | 36,017 |
| Moore | 5,706 |
| Morgan | 9,875 |
| Obion | 28,286 |
| Overton | 13,353 |
| Perry | 8,800 |
| Pickett | 5,366 |
| Polk | 11,351 |
| Putnam | 16,890 |
| Rhea | 14,318 |
| Roane | 22,738 |
| Robertson | 25,029 |
| Rutherford | 33,543 |
| Scott | 11,077 |
| Sequatchee | 3,326 |
| Sevier | 22,221 |
| Shelby | 153,557 |
| Smith | 10,026 |
| Stewart | 15,224 |
| Sullivan | 24,935 |
| Sumner | 26,072 |
| Tipton | 29,273 |
| Trousdale | 16,040 |
| Unicoi | 5,851 |
| Union | 12,894 |
| Van Buren | 3,126 |
| Warren | 16,410 |
| Washington | 22,604 |
| Wayne | 12,936 |
| Weakley | 32,546 |
| White | 14,157 |
| Williamson | 36,239 |
| Wilson | 27,078 |

23969

OFFICE SUPREME COURT of U. S.
RECEIVED
APR 27 1903

# In the Supreme Court of the United States at Washington, D. C.

## OCTOBER TERM, 1902.

## No. 209.

STATE OF TENNESSEE, ON RELATION OF C. L. MALONEY, et al.

vs.

STEPHEN F. CONDON, et al.

PETITION TO REHEAR AND MOTION TO REVIVE.

# In the Supreme Court of the United States at Washington, D. C.

## OCTOBER TERM, 1902.

## No. 209.

**STATE OF TENNESSEE, ON RELATION OF G. L. MALONEY, et al.**

**vs.**

**STEPHEN P. CONDON, et al.**

### PETITION TO REHEAR AND MOTION TO REVIVE.

Your petitioners, the Plaintiffs in Error and Relators in the above styled cause, respectfully show unto Your Honors that they are greatly aggrieved by the opinion and decree of this Honorable Court, rendered herein on the 6th day of April, 1903, dismissing their writ of error upon the ground that the terms of office of the Relators and of the Defendants had expired before the hearing of this cause in this Court.

Petitioners respectfully represent and insist that the said opinion and decree of the Court heretofore rendered is erroneous, and should be recalled, and this cause considered and determined upon the merits.

The question upon which the Court's decision, dismissing writ of error, is based, was brought to the attention of counsel for the Petitioners and Relators, for

the first time, on the day of the argument of the cause. Brief on behalf of the Defendants had not been filed within the time required by the rules, and had not reached counsel for the Petitioners and Relators in time to admit of reply by brief.

Petitioners respectfully submit that said opinion and decree are erroneous, for the following reasons:

I.

The terms of office of the Relators had not expired, if the statute under which the Defendants were appointed and some of them subsequently elected, is unconstitutional and void under the 14th Amendment to the Federal Constitution. No appointment or election under that statute could have the effect to displace Relators, if the statute is unconstitutional and void. In that event, the Petitioners and Relators held over under an explicit provision of the Constitution of the State of Tennessee.

That provision of the State Constitution is in these words: "Every officer shall hold his office until his successor is elected or appointed and qualified."

**Art. 7, Sec. 5 of the State Constitution.**
**Shannon's Code, Page 75.**

*This provision of the State Constitution was not brought to the attention of the Court on the original hearing.*

A statute void for unconstitutionality cannot affect the rights of anyone. Hence it is necessary to determine whether the statute involved is or is not constitutional before it can be held that the Relators' terms of office had expired. Besides, this proceeding is of a public character, and prosecuted in the public interest by the public prosecutor, and survives the death or expiration of the private rights of Relators. It is not prosecuted solely for ouster of Defendants.

II.

This cause should not fail by reason of the expiration of the provisional title of the Defendants, which was conferred by their appointment by the Governor under the statute, to hold until the next general election.

This suit, while brought on the relation of citizens, as is permitted by staute, is brought and prosecuted by the public prosecutor, as is likewise required by statute. The original bill or petition is signed by the Attorney-General of the circuit.

**Shannon's Code, Sects. 5168-69.**

"Any person" under the statute may be Relator. The primary purpose of a suit in a case like this is to oust the person unlawfully holding a public office, in the interest of the public.

**Shannon's Code, Sec. 5165.**

It is allowable, however, if the Relator happens to be a person entitled to the usurped office, for the Court to determine his right to the office and pronounce judgment in his favor. And in such a case "the Court may order the Defendant to deliver to him, upon his qualifying as required by law, all books and papers belonging to the office in his (Defendant's) custody or under his control, and such claimant may thereupon proceed to exercise the functions of the office."

**Shannon's Code, Sects. 5175-6.**

Thus it appears that this is a proceeding of a public nature, and that the relief granted to the Relator, who is entitled to the office, is incidental and for the public benefit, as well as that of the Relator.

It is likewise a proceeding to restore the books and papers of public office to the proper custodian. So much for the nature of the proceeding.

Petitioners aver, in this connection, that the Defendant, Stephen P. Condon, who was originally ap-

pointed Chairman of the Road Commission of Knox County, was at the election provided by said Act, in August, 1902, elected to said office, and has held the same ever since, and is holding the same at this time; and that the Defendant, H. C. Anderson, is still holding the position of Superintendent of the Workhouse of Knox County, under and by virtue of appointment under said statute. They aver further that the Defendants, R. W. Parker and Fletcher Adams, were, at said August election, 1902, elected under the provisions of said Act as members of said Road Commission in lieu of the Defendants, T. T. McMillan and James Rich, and they aver that all of said parties are at this time in possession of said offices and the books and papers pertaining thereto, and withholding the same from petitioners.

For the foregoing reasons petitioners pray that the former opinion and decree of this Court herein be recalled, and that this cause be determined upon its merits; and for this purpose they ask that the cause be continued against said Condon and Anderson, who are still holding the same offices that they held at the institution of this suit, however, under a title by election, in lieu of an appointment, under said invalid statute, and that the same be revived against said Parker and Adams, in order that an effectual decree may be rendered herein. They pray also for general relief.

Copy of this petition and notice of its presentation has been served upon each of the Defendants, and also on their counsel.

State of Tennessee,

County of Knox.

Personally appeared before the undersigned authority, G. W. Pickle, and made oath in due form of law, that the facts stated in the foregoing petition are true,

and that he is counsel for the petitioners and personally cognizant of the facts stated. G. W. PICKLE.

Sworn to and subscribed before me, this April 22, 1903. W. T. KENNERLY,
*Notary Public Knox Co., Tenn.*

G. W. Pickle, one of the counsel for the Petitioners and Relators in the above styled cause, certifies that the foregoing petition is filed in good faith, and that in his opinion it is based upon good and sufficient grounds.

This April 22, 1903.

G. W. PICKLE,
*Counsel for the Petitioners,*
*G. L. Malone, et al.*

# IN THE SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1902.

STATE OF TENNESSEE, EX REL. MALONEY, et al.

vs.

STEPHEN P. CONDON, et al.

No. 209.

**BRIEF ON PETITION TO REHEAR AND REVIVE FILED BY THE RELATORS.**

In support of their petition the Relators rely upon the following propositions and authorities:

I.

The expiration of the terms of office, for which the Relators had been elected, before the hearing in this Court, should not operate to prevent a decision in this cause upon the merits.

In the first place, the terms of office of the Relators have not expired, if the statute under which the Defendants were originally appointed, and some of them since elected to office, is unconstitutional and void. In such event the "successors" of Relators in their respective offices have not been *elected* or *qualified*, and the constitution of the State provides that "every officer shall hold his office until his successor is elected or appointed and qualified."

**Constitution, Article VII, Sec. 5.**
**Shannon's Code, page 75.**

Under this clause of the constitution it is held that a Clerk and Master, an appointive officer, holds over until his successor is appointed and qualified.

**In the Matter of R. M. Baldwin, 7 Heis., 416.**

And under this and similar provisions it has been held that public officers cannot denude themselves of the duties of their offices until their successors have been elected and qualified, where the rights of third persons were involved.

**U. S. vs. Justices, 10 Fed. Rep., 460.**
**Badger vs. U. S., 93 U. S., 599.**

Again, it is held that in a proceeding of this character, so far as it seeks to oust the usurper of a public office, judgment of ouster will be entered, notwithstanding the expiration of the term of the Relator.

**Commonwealth vs. Swasey, 133 Mass., 540.**
**Hammer vs. State, 44 N. J. Law, 667.**
**People vs. Loomis, 8 Wend. (N. Y.), 396.**
**Roane vs. Matthews, 75 Miss., 94.**

Conceding, however, that the case should be dismissed where the Relator's term of office expires while the suit is pending, and that the Court will not pronounce judgment for costs in such case, still if other relief, such as a fine or damages, or of like character is sought, then the Court will retain the case and pronounce judgment upon the merits. It is only where the case is for ouster and costs only that the Courts have dismissed on account of the expiration of the Relator's term.

Under the statute pursuant to which this proceeding was brought, the Relator is entitled, in addition to the judgment of ouster, to a judgment for the delivery to him of the books and papers belonging to the office that are in the Defendant's possession. The ouster, therefore, is not the sole object of the proceeding in this case under the statute, and therefore the case does not abate upon the expiration of the Relators' terms of office.

**See cases cited in Note to 23 A. & E. Encl. Law (2nd Ed.) page 633.**

But it is clear, under the statutes of Tennessee, that this case does not abate upon the expiration of the term of office, so far as it seeks ouster of the Defendants. It is proper to notice, in this connection, the scope and purpose of the Tennessee statute. The only purpose and scope of the writ of *quo warranto* at common law in cases of this character was to oust the usurper from his office. The Tennessee statute embraces every case falling within the ancient writ of *quo warranto*, and provides in addition for other relief, to-wit, that the Relator may have his right to the office declared and enforced in the same proceeding, and the books of the office delivered to him by the unsuccessful Defendant.

**Shannon's Code, Sec.**

The proceeding under this statute is of a public character, and whether it is instituted by direction of the General Assembly, or of the Governor and Attorney-General, or upon the information of a private person, in every case it must be brought by consent of the Public Prosecutor.

**State vs. Johnson, 8 Lea, 74.**
**State vs. McConnell, 3 Lea, 338-40.**
**State ex rel. vs. Agee, 105, Tenn., 588.**
**State vs. Turnpike Co., 3 Tenn., Chancery, 166-7.**

And even where suit is brought on the relation of a private person, it remains under the control of the Public Prosecutor.

**State ex rel. vs. Agee, 105, Tenn., 588.**

This suit was brought by the Public Prosecutor, the District Attorney, and is therefore a suit for a public purpose. Perhaps in the original brief, counsel placed too much stress upon the rights of the Relators, and did not emphasize as much as he should the public character of the proceeding.

The provision of the statute under consideration to the effect that upon the death of the Relator the suit does not abate, but may be revived in the name of any other person who desires to be substituted and become liable for the prosecution of the suit, is conclusive, it would seem, that the suit is not dependent for its continuance upon the Relator's term of office.

**Shannon's Code, Sec. 5184.**

Certain it is that the death of the Relator would terminate his right to hold the office, but it would not end the suit. The suit may continue for the public interest.

There is, besides, a general provision made by statute in Tennessee against the abatement of suits on account of transfer of interest or other cause.

**Shannon's Code, Sec. 4568.**

It should be borne in mind that the proceeding under this statute differs most materially from contests over an election. There are provisions made for the contesting of elections in Tennessee, but it is expressly provided that the validity of elections, that may be contested otherwise, cannot be contested under the provisions of this particular statute.

**Shannon's Code, Sec. 5179.**

A contested election is a private suit under the Tennessee decisions, and involves only private rights. This proceeding is brought under a different statute, and is of a public character, brought and controlled by the public prosecutor.

**State vs. McConnell, 3 Lea, 335, 337.**
**Boring vs. Griffith, 1 Heisk, 456.**
**State vs. Johnson, 8 Lea, 74.**
**State ex rel. vs. Agee, 105 Tenn., 588.**

There is no analogy between a contested election case and cases in the nature of *quo warranto*, brought under this statute. The cases of *Mills vs. Green, 159 U. S., 651*, and *Boring vs. Griffith, 1 Heisk., 457*, were

causes involving individual, not public, rights, and were prosecuted by private parties, not the public prosecutor. The private rights involved in these cases expired before the cases were decided, and there being no public interest involved, the cases necessarily abated. There are both public and private interests involved in this case. The Relators have, moreover, a "hold-over" right to their offices.

II.

The Relators should not be denied relief in this case because of the fact that the terms of office to which the Defendants were appointed have expired. There is no suggestion of this fact in the record. It can only be inferred from the terms of the statute. The Defendants have not suggested otherwise than in their brief that they are not still holding the offices, under this statute, either by appointment or by election. The fact is now brought to the attention of the Court for the first time in the petition to rehear and revive, which has been served upon the parties and their counsel, and answer invited, that the Defendant, Stephen P. Condon, holds by election under said statute, characterized by the grossest and most shameless frauds and disregard of law, the same office to which he had been appointed by the Governor, and the Defendant, H. C. Anderson, holds under said statute the same office and by the same title that he held it at the commencement of the suit. They are therefore still usurping the offices, if the statute is void, and wrongfully withholding them and the books and the papers of the offices from the Relators. Their title by election is no better than their title by appointment under this void statute.

As to the other Defendants, if their presence before the Court is material, the cause should be revived against them. See Shannon's Code, Sec. 4568. If

23975



this cannot be done, then it would be impossible for the Relators ever to obtain a remedy. Supposing them to hold over for two years, as they undoubtedly have done, if the statute in question is void, the Defendants, if a new suit must be brought upon each election of new officers, under the statute, can prolong the litigation in each new case, until their terms have expired, so that it would be practically impossible ever to prosecute a suit to a termination before the particular term of office had expired, and this statute, however void, might in that way be operative perpetually.

Respectfully submitted,

G. W. PICKLE,
J. W. GREEN,
*Solicitors for Relators.*

IN THE

# Supreme Court of the United States.

THE STATE OF TENNESSEE ON THE RELATION OF G. L. MALONEY, Et Als, *Plaintiffs in Error.*

vs.

STEPHEN P. CONDON, T. T. McMILLAN, JAMES RICH AND H. C. ANDERSON.

## STATEMENT OF CASE.

Until February 8th, 1901, two of the relators, viz., G. H. Strong and T. A. Rambo were Pike Commissioners of Knox County, Tennessee, with terms of office expiring in January, 1902, two other relators Sam Vance and J. F. C. Harrell were Workhouse Commissioners of said County, with terms expiring in January, 1903; two others, S. L. England and I. N. White were Workhouse Commissioners of said County with terms expiring in 1902; another, R. L. Peters, was Superintendent of the Workhouse, whose term expired in January, 1902. There was only one other relator.

*Record page 2.*

The term of office of this remaining relator, G. L. Maloney, County Judge, expired September 1, 1902, as will be shown below where we state the expiration of defendant's terms. The record does not state expressly that the terms of Vance and Harrell as Workhouse Commissioners expired in January, 1903, but shows that they were elected in January, 1901, to serve till 1903. That is, their term was two years.

*Record page 2.*

The Statute of Tennessee under which they were elected made their term as alleged in the bill, two years, as the fol-

lowing quotation from it will show: "Two of said commissioners shall serve for the term of one year, and two for the term of two years; and annually thereafter the said quarterly Court shall keep said commissioners elected, by electing two commissioners for the term of two years. * * * *Act* 1891, *Chap.* 173, *Sec.* 1. *Shannon's Code of Tennessee, Sec.* 7401.

On the 8th of February, 1901, the General Assembly of Tennessee passed an act by which the management and control of County roads including turnpikes, and also of County Workhouses, in counties having a population of not less than 70,000 nor more than 90,000 under the present or any subsequent Federal Census, was vested in three public road commissioneds. *See Appendix hereto.* All the relators were, in February, 1901, road or workhouse officers in Knox County, except G. L. Maloney, who as County Judge, was *ex officio* chairman of the Workhouse Commission.

*Record page* 2.

The said Act of February 8, 1901, became operative at once in Knox County, effecting an implied repeal of the Statutes under which relators had charge severally, as shown, of the county roads and of the workhouse.

The Public Road Commissioners, appointed *pro tempore*, by the Governor under the provisions of the Act of 1901, entered upon the discharge of their duties, with the aid of a mandatory injunction, to Maloney, County Judge, as appears in the opinion of the Tennessee Supreme Court printed below, and thereupon these relators filed this bill charging that said Public Road Commissioners, the defendants in error, had usurped their offices, and that said Act of 1901, was in violation of the State Constitution, being vicious class legislation.

In the Court of Chancery Appeals and in the Supreme Court of the State the question was made without pleadings to support it, that said Act of 1901 was also violative of the XIV Amendment of the Constitution of the United States.

This cause was heard and determined on appeal from the

Chancery Court, by the Court of Chancery Appeals of the State of Tennessee with the cause of S. P. Condon et als. vs. George L. Maloney, Judge, as appears from the record in this cause.

*Record page* 22.

The Court of Chancery Appeals refers to and adopts its opinion in Condon vs. Maloney, as to certain important questions herein.

*Record page* 22.

Upon appeal to the Supreme Court of Tennessee, the two cases were heard and determined together, and the written opinion of that Court was decisive of both cases. That opinion is not included in the record brought up to this Court by the plaintiffs in error, and therefore we present it below in full as part of our brief.

The sole contention of plaintiffs in error in this Court is that the act of the Tennessee Legislature, viz., Chapter 8, Acts 1901, is invalid because it is violative of the XIV Amendment of the Constitution of the United States.

Returning to the subject of the expiration of the terms of office of the several parties to this suit, we reaffirm that the terms of all the relators have expired. This is sufficiently shown above from their own pleadings, except as to George L. Maloney, County Judge. But his term also expired in 1902. By Section 5, of Article 7, of the Constitution of Tennessee, it is provided: "Elections for judicial and other civil officers shall be held on the first Thursday in August, one thousand eight hundred and seventy, and forever thereafter on the first Thursday in August next preceding the expiration of their respective terms of service. The term of each officer so elected shall be computed from the first day of September next succeeding his election." * * *

*Const. Tenn. Art. 7, Sec. 5, Shannon's Code of Tenn. p. 75.*

Thus all elections of State officers in Tennessee date from the first Thursday in August, 1870. Section 4, of Article VI, of the Constitution of Tennessee, is as follows:

"The Judge of the Circuit and Chancery Court, and other inferior Courts shall be elected by the qualified voters of the District or Circuit to which they are to be assigned. Every Judge of such Courts shall be thirty years of age and shall, before his election, have been a resident of the State for five years, and of the Circuit or District one year. His term of service shall be eight years."

*Const. Tenn., Art. VI, Sec. 4, Shannon's Code of Tenn. p.* 69.

Therefore the term of all inferior Judges in Tennessee is eight years, the periods constituting the terms being estimated from September 1, 1870, as shown above, and one of them expired in 1902.

A County Judge is a member of the State Judiciary.

*State vs. Glenn, 7 Heisk. (Tenn. Rep.)* 486.

A County Judge is an inferior Judge within the meaning of the Constitution.

*State vs. McKee, 8 Lea, (Tenn. Rep.)* 24.

It is explicitly decided by the Supreme Court of Tennessee that G. L. Maloney, Judge of Knox County, was a member of the Judiciary of the State, and entitled to hold for the eight year term as above set out.

*State ex rel. Rambo vs. Maloney, 92 Tenn.,* 62.

It thus appears that all the relators have gone out of office by operation of law since this suit began.

It is also true that the term of office of the defendants has expired, under their temporary appointment and that their places must now be held by successors who have been elected, as will appear from the following quotation from the Act which this bill attacks, viz.: "As soon as this Act shall take effect the Governor shall appoint three (3) commissioners, who shall constitute the first Board of Public Road Commissioners. * * * The Commissioners so appointed by the Governor shall hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election" * * *

*Chap.* 8, *Act, Tenn.* 1901, *Sec.* 1, *p.* 10. *Appendix hereto.*

The Act was passed February 8, 1901, and approved same day, to take effect at once.

*Acts Tenn.*, 1901, *p.* 18.

The Code of Tennessee provides that "Elections for all civil and judicial officers shall be held forever hereafter on the first Thursday in August next preceding the expiration of the respective terms of such judicial and civil officers, viz.: For Judges of the Supreme, Circuit, Chancery and other Courts, and Attorneys for the State in each Circuit or District every eight years; for justices of the peace in each civil district in every county every six years; for clerks of the Circuit, County and other Courts and for Register, every four years; for Sheriffs, County Trustees and Constables every two years, counting from the first Thursday in August, 1870."

*Shannon's Code of Tenn., Section* 1154, *p.* 369.

A simple mathematical calculation will show that an election for all these officers, except those holding six years, was held in August, 1902, that being the "next general election of county officers"—referred to in the quotation above from the Act of 1901.

Thus it is demonstrated that all the parties to this suit, both relators and defendants are now out of office. And as no fine or other penalty can be imposed on the losing party, your Honors are called upon to decide a purely academic question. No claim for damages can be made in this cause by either party. The Code of Tennessee expressly provides another action for the recovery of damages in proper cases of this kind.

*Shannon's Code of Tenn., Sec.* 5177.

It is true costs of suit may be imposed, but when this writ of error was taken it was known to plaintiffs in error when the terms of office of all parties would expire, the same appearing clearly in the Statutes of Tennessee. We present below, our reasons for insisting that the suit has abated and must be dismissed at the cost of plaintiffs in error.

## ARGUMENT.

### I.

### RELATORS NOT NOW ENTITLED TO MAINTAIN THIS SUIT.

We submit with confidence that as the terms of office of all parties to this suit have expired, as no fine can be imposed, and as the dates of the expirations of the several terms of office of the parties were matters of plain statutory law when this writ of error was sued out, the plaintiffs in error can no longer maintain the suit.

Conceding that this action lies for the purpose for which it was instituted, it is certain that plaintiffs in error are not now entitled to hold any office, and that the terms of office of the defendants in error, have likewise expired. The defendants in error are ousted as effectually as if the ouster had been accomplished by the mandate of this Court. The Court can not restore plaintiffs in error to any office nor award them damages; it can not oust defendants in error, because they are no longer in office.

It is true of course that if the case were a proper one for such action this Court might pass upon the abstract question of the constitutionality of said act of 1901, and declare the same god or bad, as the law may be, despite the fact that no personal interest of any party to the suit would be affected by this decision.

If cases justifying such action be conceivable this certainly is not one of them.

The original proceeding in this cause was not a writ of *Quo Warranto*, nor an information in the nature thereof, but a substitute proceeding. Neither *Quo Warranto* nor the information in the nature thereof was ever in force in Tennessee.

*Martin and Yerger* (*Tenn. Rep.*) *p.* 286.

*State vs. McConnell*, 3 *Lea* (*Tenn. Rep.*) *p.* 335.

The substitute proceeding is a bill in equity brought by the State through an authorized officer, or by such authorized officer in the name of the State upon the relation of a private party.

The assumed authority for resorting to this process in this case is in sub-section 1, of Section 5165, of Shannon's Code of Tennessee, where the following language is used, stating in what cases the action lies, viz.: "Whenever any person unlawfully holds or exercises any public office or franchise within this State." * * *

*Shannon's Code, Sec.* 5165, *Sub-Sec.* 1, *p.* 1311.

The Code of Tennessee provides for bringing this action by private persons as follows: "It is also brought on the information of any person upon such person giving security for the costs of the proceeding," * * *

*Shannon's Code, Sec.* 5169.

Leave of Court to file the bill is not necessary.

*8th Lea, Tenn. Rep. pp.* 76-77.

The only judgment authorized by the statute is exclusion from office, with the payment of the costs of the suit. The statute upon this point is in the following language, "When a defendant whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise and that he pay the costs.

*Shannon's Code, Sec.* 5180.

The Statutes authorize no other judgment and, we think, admit of no other.

As showing that the action when brought by a relator is purely a personal one, in substance, we quote the following statute of Tennessee, "Should the relator die pending the action, the suit abates, unless by the second term thereafter, it is revived in the name of some person, who on application and giving security for costs is substituted in the place of the deceased relator. * * *

*Shannon's Code, Sec.* 5184.

It seems clear that as the death of the relator abates the action, the termination of the relators interest in it, must have the same effect, and especially does this construction seem imperative when not only have the relators, as in this case, lost all interest in the ouster of the defendants, but the defendants are, already out of office and a judgment of ouster can not be rendered.

Upon the subject of the judgment to be rendered, the Supreme Court of Tennessee uses the following language: "These provisions are specific and clear that the matter in contest to be decided is the usurpation of the office or franchise; and the judgment, exclusion from that office or franchise and the money judgment to be given is for costs, and the damages, if any have accrued, are provided for in another suit to be brought within a year after the judgment."
* * *

*Scott vs. Cummings, 5 Heisk. Tenn. Rep., pp.* 613-614.

The results of the statutes and decisions just quoted seem to us to be that this action is essentially a personal or private one, abating on the death of the relator or person promoting it, and, inferentially, abating also upon the cessation of his personal interest in it; that the only prescribed, or possible judgment is removed from office; that the joinder of the State is a form which has no significance or substantial legal effect; and that the suit must now abate as it is impossible to accomplish the only result for which it could have been brought legitimately, and your Honors are called upon by plaintiffs in error to decide a grave constitutional question, in order to dispose of a trivial cost bill, improvidently incurred.

The unreality of the state's connection with the prosecution of this suit, is the more apparent when it is remembered that, its legislature passed the act of 1901, its Governor approved the act, and its Supreme Court has declared the act constitutional.

In High on Ex. Leg. Rem. it is said: But when the

relator seeks by information not only to oust respondent but also to establish his own right to the office, he must show both his interest in and title to the office, etc

*High Ex. Leg. Rem.* (3rd Ed.)*Sec.* 360 *citing State vs. Boal,* 46 *Mo.,* 528; *Andrews vs. State,* 69 *Miss.,* 740.

The same author says: "Ordinarily it would seem to be a sufficient objection * * * that the case is one in which the court can not give judgment of ouster even should the relator succeed."

*High on Ex. Leg. Rem.* (3rd Ed.) *Sec.* 644.

The final prayer of the bill in this cause is that defendants in error be required to surrender and turn over to the rightful owners thereof all the emoluments, etc., of their offices.

*Record page* 4.

That the state is not in any real sense a party to a suit of this kind was in effect declared by this Court in *Miller vs. State,* 12 *Wallace,* 159, passing upon a motion to advance a cause on the ground that a state was a party. The motion to advance was refused because the relators were the real parties plaintiff.

We have examined the decision of this Court in the case of the *United States vs. Boutwell,* 17*th Wallace,* 604, and rely upon it as supporting our general proposition that this suit must abate. It is true that that was a mandamus case, but the rule recognized in it, as to abatement, would seem to be applicable in all respects to a case of this kind. No special provision as to costs appears in the opinion in that case, but as the suit was abated it is assumed that the costs followed the dismissal. We can conceive of no reason why the present proceeding should not be dismissed at the cost of the relators as the abatement here will be destructive of the entire case and there is no possibility of a revivor.

II.

## CLASS LEGISLATION.

On the subject of class legislation, and the alleged violation of the constitutions of Tennessee and of the United States, by the said Act of February 8, 1901, we adopt as our argument and print here, in full, the opinion of the Supreme Court of Tennessee deciding this case and the connected case of Condon et als. vs. G. L. Maloney, County Judge, viz.:

Filed November 9, 1901, J. G. Stuart, D. C.

S. P. Condon, et al, vs. G. L. Maloney, County Judge and State, ex rel, vs. S. P. Condon, et als.

## OPINION.

These are consolidated causes. The first is a proceeding by mandatory injunction, to compel the defendant Maloney, as County Judge, to examine and approve the bonds of complainants as road commissioners of Knox County, they asserting claim to that office, by virtue of an appointment by the Governor, pursuant to the provisions of an act of the last session of the Legislature. (Acts 1901, ch. 8, p. 10.) In their bill, it is alleged that they had tendered to the defendant, the bonds executed in all respects as required of them by the 15th section of the act, for his approval as County Judge, and that he had declined to examine or approve them, upon the sole ground assumed by him,-that the act was void, for unconstitutionality,—and the prayer of the bill is that a mandatory injunction be awarded to require him to discharge the duty of examination and approval as one merely ministerial. In accordance with the prayer, a writ of mandatory injunction was awarded. Subsequently a demurrer calling in question the right of the complainants to this injunction and challenging the constitutionality of the Act was filed, and upon argument overruled. The defendant declining to make further defense, a final decree was entered, affirming the right of the com-

plainants to the relief sought. From this decree, an appeal was prayed and granted.

The second of these causes is a statutory proceeding in the nature of a quo warranto, brought after defendants, (who are the complainants in the first named case) had been inducted into office, as the result of the mandatory injunction referred to, on the relation of the removed officials, assailing the title of the defendants to the office of Public Road Commissioners, and seeking reinstatement of the relators. The attack of the relators on the title of the defendants is based, on the assumed unconstitutionality of Ch. 8 of the Acts of 1901. Upon demurrer the bill was dismissed, and the relators appealed.

The causes was heard by the Court of Chancery Appeals, and the decree of the Chancellor in each was affirmed. From these decrees of affirmance, the defendant Maloney, in the one, and the relators in the other of these cases, have prosecuted appeals to this court.

The questions involved in the two causes, are the same save in the first, it is insisted for the defendant Maloney that the action of the Chancellor in awarding the mandatory injunction was arbitrary and unauthorized, and this court is earnestly asked to so pronounce.

Rare as is the use of this extraordinary process, yet the power of the Chancellor to grant it, in a proper case, is recognized in equity practice, and we are not prepared to say that there was here an abuse of discretion.

But if it was conceded the writ should not have been awarded, yet it appears from these records that it was obeyed by the County Judge in the examination and approval of the bonds submitted to him, and the complainants were inducted into office. This being done, the writ spent its force, and a reversal of his decree in that regard, could not undo what has been done. This being so, it would be an idle ceremony, even if disapproving the Chancellors action, to enter such a decree.

This brings us to the more serious questions raised by these appeals.

The Act, the constitutionality of which is challenged by the respective appellants, is entitled an Act to Create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State in counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year 1900, or any subsequent Federal Census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this Act."

It is a well established canon of constitutional construction, and certainly is now axiomatic in this State, that he who seeks to have a legislative Act declared void on the ground that it is violative of the constitution, must be prepared to place his finger upon the clause which vitiates it. For as was said by Caldwell, J., in *Cole Mfg. Co., vs. Falls*, 90 *Tenn.* 468. "All intendments are in favor of the constitutionality of an Act of the Legislature, passed with the forms and ceremonies requisite to give it the force of law. * * * Every reasonable doubt must be solved in favor of the legislative action."

Bearing this rule in mind, we come now to the consideration of the act in question.

In the first place it is said that this is vicious class legislation passed in violation of Article XI, Sec. 8, and Article 1, Sec. 8, of the State constitution, and the XIV Amendment to the Federal Constitution. These several sections are so familiar it is not worth while to set them out here.

*In Harbison vs. Knoxville Iron Co.*, 103 *Tenn.*, 421-431, it is said that the phrase, "by the law of the land" as used in Section 8, Art. 1, of the State constitution is the exact equivalent of the terms "due process of law," as used in the Federal constitution, and it is asserted in the argument of the counsel for the appellants, "that whatever is forbidden as vicious class legislation by the State constitution is likewise forbidden by the XIV Amendment to the constitution of the United States."

We will then first refer to one or more of the leading cases, decided by the Supreme Court of the United States, involving the question of legislative classification, and ascertain the rule adopted by that court.

*In Magoun vs. Ill. Trust and Savings Band,* 170 *U. S.,* 282, was raised the question of the constitutionality of the inheritance tax law of the State of Illinois. That Act classified successions, and fixed the rate of taxation upon them in substance as follows: "1st. When the beneficial interest to any property or income therefrom should pass to or for the use of a father, mother, husband, wife, child, brother, sister, wife or widow of the son, etc., in every such case the rate of tax should be one dollar on each one hundred dollars of the market value of the property received by such persons, provided, however, that any estate of less value than twenty thousand dollars, received by such person, should not be the subject of this tax." 2. When the beneficial interest to any property passed to or for the use of any uncle, aunt, etc., in any such case the rate of such tax should be two dollars on every one hundred dollars of the market value of such property received by each person, in excess of two thousand dollars, so received; and 3rd, in all other cases, the rate should be on each one hundred dollars of property received, as follows: on all estates of ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars, and on all estates over fifty thousand dollars, six dollars, etc.

This act was attacked as vicious class legislation, it being insisted, that it was necessarily arbitrary and its provisions as causing discrimination and creating inequality of burdens of taxation, in violation of the Fourteenth Amendment, which prohibits a state denying to any citizen the equal protection of the laws.

To this contention, the Court speaking through McKenna, Justice, said, "What satisfies this equality has not been and probably can never be defined. Generally it has

been said that it 'only requires the same means to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.'" *Kentucky Railroad Tax Cases*, 115 *U. S.*, 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. * * * It may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude, as far as interference by this court is concerned. * * * In other words, the State may distinguish, select and classify objects of legislation and necessarily this power must have a wide range of discretion."

And so it was, the Court held that the Act did not infringe upon the Fourteenth Amendment, though it relieved absolutely persons who belonged to the first class and yet came into property of a less value than twenty thousand dollars—while it placed the burden upon all others of that class succeeding to property of greater value than twenty thousand dollars, and not only placed a still heavier burden upon those belonging to the second and third classes, but graduated this burden among those belonging to these classes, according to the value of their respective successions. Yet, we think, it might possibly be difficult to assign any satisfactory reason why a person of the first class receiving an estate of twenty thousand dollars should pay this inheritance tax, while another person of the same class received a dollar less should be relieved from it, and so with regard to the discrimination made in other cases.

Nor did the court attempt to assign any reason for the difference. On the contrary, it said, "There is * * * no precise application of the rule of reasonableness of classification, and the rule of equity permits many practical inequalities. * * * It only requires that the law * * * shall operate on all alike under the same circumstances."

Thus in substance, using the language employed in so many of our cases which deal with the two clauses of the State Constitution in question here.

*In Orient Insurance Co. vs. Daggs*, 173 *U. S.*, 557, was involved a statute of Missouri providing that in suits upon policies of insurance against loss by fire, the defendant shall not be permitted to deny that the property insured was worth at the issuance of the policy, the full amounts covered by the policy; and in case of total loss, that the measure of damages should be the amount at which the property was insured less depreciation in value between the time of issuing the policy and the time of the loss, and the burden of providing such depreciation should be on the defendant, etc.

It was objected that this statute was passed in violation to the Fourteenth Amendment of the Federal Constitution, in that it discriminated, "as to the subject matter, as to the parties, as to the mode of trial of actions at law and equity and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate the contracts, compel it to pay damages never sustained, and prevent it from having an investigation upon the trial by due process of law."

The court in disposing of this contention refers to the case of *Magoun vs. Illinois Trust and Savings Bank*, supro, as containing a late review of the subject, and adds, "We said in that case that the State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion. And this because of the function of legislation and the purposes to which it is addressed. Classifications for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It sufficies if it is practical and is not reviewable *unless palpably arbitrary*." The Court then concludes, "the classification of the Missouri statute is certainly not arbitrary."

Without citing other cases from that Court, it will be sufficient to say, that an examination of the United States Supreme Court reports will show that the Court has failed

not only to declare all legislative classifications to be obnoxious to the Amendment in question, but on the other hand, has recognized many State laws classifying property of persons, in their respective relations, as outside the inhibition of the Amendment. The theory upon which this holding rests, is thus stated by Field, Justice, "The greater part of all legislation is special either in the objects sought to be obtained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas * * * laws for the irrigation and drainage of particular land * * * are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character * * * . And when legislation applies to particular bodies or associations imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them for the amount of their work and a law requiring Railroad Corporations to erect and maintain fences along their railroad * * are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment if all persons subject to it are treated alike, under similar circumstances and conditions in respect both of the privileges conferred and liabilities imposed."

So we are satisfied that this act does not in any regard infringe the Fourteenth Amendment to the Federal Constitution, as it operates upon all counties in like conditions, with uniformity, and can not be said to be palpably arbitrary. The same rule of construction that saves it in this regard will protect it from the condemnation of Section 8 of Article 1 of the constitution of the State. For a classification is safe as against this provision, when, as this does, it embraces equally all counties which are now or hereafter may be in

like conditions. *Stratton vs. Morris*, 89 *Tenn.* 534, *Harbison vs. Knox. Iron Co.*, 103 *Tenn.* 747.

Is the Act violative of Article XI, Section 8, of the State constitution, in that it grants to, "one individual or individuals, rights, privileges, immunities or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of the law."

It applies alike to all, "counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of the year of 1900 and subsequent Federal Census." By its terms it applies with uniformity to all counties which had the requisite population at the time of passage of the Act, and to all such as hereafter may fall within its provisions, as indicated by it.

The question of the constitutionality of legislation providing for a classification of towns, cities, and counties, with the view to the operation of particular statutes has long since been put at rest by the decisions of this State. Perhaps no statutes have been more stubbornly contested, than those at stake in *Luerhman vs. Taxing District*, 2 *Lea*, 245, and *Cook vs. State*, 90 *Tenn.*, 407, yet both provided for classifications resting for population upon the Federal Census, and both were upheld.

The first of these cases called in question a series of Acts constituting however a system, beginning with the Act repealing the character of certain municipal corporations (1879 Ch. 10) and ending with the Act to establish Taxing districts (1879 Ch. 11), and the Act amendatory thereof (1879 Ch. 84) and the second the "District Law," Ch. 24, Ex. Ses. 1890.

But it is said the Acts in controversy in these cases, are to be distinguished from the one at bar in the present case.

We do not think so. We are unable to discover how the case of *Cook vs. State*, supra, can be maintained and the Act now in question, be annulled as capricious and arbitrary. In essentials they are the same, and the one can not stand while the other falls.

But it is urged that no reason has been assigned, for limiting the operation of the Act of Counties, "having a population of not less than 70,000 and not more than 90,000," and thus necessarily excluding the counties of Shelby and Davidson, each having a population, according to the Federal Census, largely in excess of 90,000. To this objection it may be said, as to Davidson, that the legislature may have found as a reason for its exclusion that it was covered by turnpikes, built and controlled by private chartered companies, and in the matter of Shelby that the public has already perfected a network of good roads, under a system entirely satisfactory.

But while the Courts frequently find and assign reasons for legislative classification, yet it is by no means uniformly so. And it does not follow because the reason for the classification is not disclosed in the face of the Act that it is necessarily without reason and capricious. Reasons eminently wise and provident might control the law making body, which do not appear upon the fact of the statute, and for the courts to strike it down, because not readily perceptible, might well be criticised as an act of judicial usurpation. Nor is there any abdication of constitutional duty or responsibility in this action.

The true question in each case is, is the classification capricious, unreasonable or arbitrary?

As is said in the opinion of the court by Caldwell, J., in *State ex rel vs. Schlitz Brewing Co.*, 104 *Tenn.*, 715, 731, "Class legislation is of two kinds, namely that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious." The Court then refers to the case of *Magoun vs. Ill. Trust and Savings Bank*, supra, and *Orient Ins. Co. vs. Dragg*, supra, with approval, and with regard to classification embodies from the latter case a sentence already quotted that, "it suffices if it is practical and is not *reviewable unless palpably arbitrary.*"

This is the later utterance of this court, upon this vexed question, made after a careful collation and consideration of the cases, and we are satisfied of its soundness.

Applying this criterion to the statute we are satisfied that, it is not vicious classification."

But it is said that this statute is void, because, while general in its terms, yet as a matter of fact only the county of Knox falls within its provisions when passed.

The same objection would and in fact was made in the case of *Luerhman vs. Taxing District,* supra, that only the City of Memphis, fell within the provision of the Acts there in question and in the case of *Cook vs. State,* supra, that only two counties in the State could avail themselves to the district law, and in *Peterson vs. State,* 104 *Tenn.,* 127, that the no-fence-law (Ch. 23, Acts 1899), applied only in counties of the State having a population of 59,000 or more by the Federal Census of 1890, etc., but in each case the objection was overruled. These cases were decided after careful deliberation, and we see no occasion to question their absolute correctness.

Again, it is insisted that the statute is void, because in violation of Article XI, Sec. 17, of the State constitution, in that it includes two distinct subjects, to-wit: public roads and workhouses.

In *Cannon vs. Mathes,* 8 *Heisk.,* 504, the Court quoted with approval from Judge Cooley on Constitutional Limitations, as follows, "The general purpose of these provisions is accomplished when the law has but one general object which is fairly intended in the title. To require every end and all means necessary or convenient for the accomplishment of this general object to be provided by a separate Act relating to that alone would not only be unreasonable, but would actually make legislation impossible. * * * The generalityof the title is no objection to it so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment, can be considered as having a necessary or proper connection."

Many illustrations of the application of this rule of construction may be found scattered through our reports. Among these are the cases of *Cole Mfg. Co. vs. Falls,* 90

*Tenn.*, 466; *Ryan vs. Terminal Co.*, 102 *Tenn.*, 125; *State vs. Brown*, 103 *Tenn.*, 450. It will be unnecessary to examine these cases in detail. It is sufficient to say that they recognize the rule as stated by Judge Cooley and supported in *Cannon vs. Mathes*, supra, or else the same rule stated in different languages in *Sutherland on Statutory Construction, Sec.* 93, as follows: "Where the title of a legislative act expressed a general subject or purpose, * * * all matters which are naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purpose so stated and properly included in the Act and are germane to its title."

On this point we adopt the language of the brief of counsel for appellees: "Not only is it true historically that working convicts on roads is a part of the public policy of the State, but it is also true, that it has the sanction of positive law."

*See Shannon's Code, Sec.* 1642, *Acts* 1891.

Here it is expressly declared that all persons confined in county jails or workhouses shall be available to the Commissioners for the purpose of working on public highways.

Thus the two subjects of public roads and of workhouses have been connected in the history and in the legislation of Tennessee until it is fair to say that the connection has become organic, and it is entirely within the power of the legislature in seeking to secure good roads, to place these two matters, thus connected, under one control; it is proper that the Commissioners who must work the convicts on the roads, should have the control of the convicts. A divided jurisdiction is always unsatisfactory and injurious." We therefore think this objection is unsound.

Finally, it is said that the Act is violative of Sec. 17, Art. XI, of the Constitution, which forbids the filling of a county office created by the legislature otherwise than by election of the people or by the County Court, in as much as it authorizes the Governor to appoint the Commissioners constituting the first board, who shall hold their office until the next general election.

The appointment provided for in the Act is temporary in character. Its object is to place the new system in operation without delay. A question very similar in principle was considered by the Supreme Court of Michigan in *People vs. Hurlburt*, 24 *Mich.*, 44. The opinion inthat case was delivered by Judge Cooley, who, while expressing a doubt whether the legislature could constitutionally appoint for a municipal corporation, when the constitution contained express provision for their local appointment, officers, whose duties were exclusively local; yet held that it was entirely competent for that body to make provisional appointment of such commissioners to put the new system in motion.

But independent of the authority of that case, we have no doubt that the legislature had the power to vest in the Governor this right of temporary appoint. Sec. 4 of Art. VII of the Constitution provides that, "The election of all officers and the filling of all vacancies not otherwise directed or provided by this constitution shall be made in such manner as the legislature shall direct."

The term "vacancies," as used in the constitution has in a recent case been defined by this Court. In *State ex rel. vs. Maloney*, 92 *Tenn.*, 62, it is said the word "vacancy" covers equally a case "where the appointment or election may be made to fill an office for the first time and where it may be made to fill one whose previous incumbent has died, resigned or been removed.

*In State ex rel. vs. Glenn*, 7 *Heisk.*, 472, it was insisted that the office of County Judge was a county office, and that one appointed by the Governor to fill a vacancy occasioned by the death of a late incumbent was not entitled to serve by reason of the provision of Section 17 of Art. 41. To this the Court replied: "Assume for argument that 'this section' may include a county judge, does it prohibit a temporary appointment by the Governor until the next election? It says that the office shall not be filled otherwise than by the people or the County Court. Other portions of the Constitution provide that the Judge of the Circuit and other Courts shall be elected by the people. This is certainly equivalent to

saying that the office shall not be filled otherwise than by the people and the constitution has no provision for the filling of a vacancy in the office of a judge by an appointment of the Governor, but it does contain a provision that the election of all officers and the filling of vacancies not otherwise directed or provided for by this constitution, shall be made in such manner as the legislature may direct, and under this power the legislature directs the appointment to be made by the Governor. * * * The provision that the office (of Judge) shall only be filled by the voters, has not been supposed to take away the power of the Governor to fill a temporary vacancy." And we are satisfied that the contention that the same provision operates to prevent the legislature from conferring upon the Governor the power to fill a temporary vacancy existing in the office of road commissioners, in the institution of this new system is unsound.

It is not improper to say before closing this opinion that the *State vs. Glenn*, supra, is cited with approval in the *Judge's cases*, 102 *Tenn.*, 547, but by a typographical error, McAlister, J., is made to say that the provisions of the constitution in question, "relates only to the mode of filling a temporary vacancy."

The decree of the Court of Chancery Appeals in each of the causes is affirmed.

BEARD, J.

Office of Clerk of the Supreme Court,
For the Eastern Division of the State of Tennessee.

I, Alex McMillan, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion of said Court, pronounced at its September term, 1901, in case of S. P. Condon et al. vs. G. L. Maloney, County Judge, and State, ex rel. vs. S. P. Condon, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Knoxville, on this, the 14th day of January, 1903.

(Seal) ALEX McMILLAN, Clerk.
By J. G. STUART, D. C.

## III.

## THERE IS NO FEDERAL QUESTION.

The exhaustive and convincing opinion of the Supreme Court of Tennessee, as to the bearing of the XIV Amendment of the Constitution of the United States upon said Act of February 8, 1901, would, we think, be sufficient if there were now a federal question in the case, but we submit with confidence that there is no such question remaining. The plaintiffs in error attack the Act of 1901 because it applied only to Knox County at the time of its passage. This may be conceded, and it follows that in a sense the act is class legislation, but we need not offer arguments or cite authority to show that class legislation is not necessarily vicious. The leading cases on the subject are cited in the opinion above.

If this act be vicious it is so, solely by reason of the fact of its original applicability to only one county, and not because it may not affect all other counties coming into the same category with that one county.

If the act invades any rights of relators, they are rights of State citizenship and not of national citizenship, and therefore are not protected by the XIV Amendment.

*Brannon on XIV Am. p.* 56.

*Slaughter House cases,* 16 *Wall.* 36.

*Holden vs. Hardy,* 169 *U. S.*, 366.

Without enlarging upon the proposition that the rights involved in this litigation are those of state citizenship and not of United States citizenship, we rely confidently upon that proposition for the defeat of this suit in any event. Fortunately there is authority which supports the proposition generally, and applies in a striking way to the particular facts of this case. In the case of *Holden vs. Hardy,* 169 *U. S.* on page 387, Mr. Justice Brown delivering the opinion quotes and approves the following from the case of *Missouri vs. Lewis,* 101, *U. S.*, 22, 31: "We might go still further and say, with undoubted truth, that there is nothing in the consti-

tution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the State, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. * * * The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state."

We submit that the principle announced in this quotation meets every conceivable objection to the Tennessee Act of 1901, that can be urged in this case. We repeat that the sole objection now made or that can be made is that the said Tennessee Act applied only to Knox County at the time of its passage.

It has been decided many times by this court that it will follow the state courts in the construction of state constitutions. The rule is so well established that we consider it necessary to cite only one authority, viz.: "We may think that the Supreme Court has misconstrued its constitution or statute, but we are not at liberty to, therefore, set aside its judgments. That Court is the final arbiter as to such questions."

*Forsyth vs. Hammond*, 166 *U. S.*, 518-519.

It being thus established that the Supreme Court of

Tennessee is the "final arbiter" in the construction of the constitution of Tennessee, we assert next that when that court has decided that any particular legislation is authorized by the constitution of Tennessee such particular legislation has a constitutional warrant which is in every way, for every purpose, equivalent to an express warrant therefor, written in the constitution of the state itself. In other words, this act is not invalid because it applies or applied originally, to only one county, any more than it would have been invalid if it had been passed in pursuance of express words in the constitution authorizing legislation applicable to only one county. The power to enact legislation of this kind is, since this decision of the Supreme Court of Tennessee as much a part of the constitution of Tennessee as if the Constitutional Convention had written the power in the constitution itself. It follows, we submit, that this Court will not review the action of the Supreme Court of Tennessee in this case unless the opinion of that Court approves something which is inherently wrong or violative of natural right or of established constitutional principles, and we affirm with confidence that this particular legislation in no way transcends the right of the state as declared in the quotation from *Holden vs. Hardy* above set out.

It may illustrate our meaning to call attention to the fact that Section IV, Article X, of the Constitution of Tennessee provides a method for establishing new counties and prescribed the conditions under which they be established, but immediately proceeds to make various exceptions applicable only to particular counties or parts of counties. For instance, on *page* , *Shannon's Code of Tennessee*, it will be found that Bledsoe County is excepted entirely from the provisions applicable to other counties in the following language:

"No part of Bledsoe County shall be taken to form a new county or a part thereof, or to be attached to any adjoining county." Again, on *page* 78, *Shannon's Code* at the end of the second paragraph, being part of said Section IX, Article X, is the following: "But the foregoing provision

requiring a two-thirds majority of the voters of the county to remove its county seat shall not apply to the counties of Obion and Cocke." Referring to this last quotation, it is very certain that the exception there declared is far more violative of equality and of the rule against special laws and class legislation than the act now under consideration, but we assume that no one would think of contesting the validity of the provision. Again, in Section XIII, Article XI, of the Constitution of Tennessee, it is provided as follows: "The General Assembly shall have power to enact laws for the protection and preservation of game and fish within the state, and such laws may be enacted for and applied and enforced in, particular counties or geographical districts designated by the General Assembly."

*Shannon's Code, p.* 48.

We say again that the Knox County Road Law, which is now attacked, having been declared constitutional by the Supreme Court of Tennessee can not now be held unconstitutional as violative of the XIV Amendment of the Federal Constitution any more than the express provisions of the state constitution applicable to particular counties, that we have quoted.

The result, as we see it, is that your Honors are now called upon, in reality, not to declare said Tennessee Statute of 1901 obnoxious to the XIV Amendment of the Federal Constitution, but to reverse the action of the Supreme Court of Tennessee in holding it permissible under the constitution of Tennessee.

It is respectfully submitted that the suit of relators must be dismissed and all relief denied them.

CHARLES T. CATES, JR.,
JOSHUA W. CALDWELL,
*Solicitors.*

## APPENDIX.

Caption and Section 1 of Chapter 8, Acts of Tennessee, of 1901, from pages 10 and 11 of published Acts of Tennessee, 1901.

### CHAPTER 8.

### HOUSE BILL NO. 369.

AN ACT to create a Board of Public Road Commissioners, to regulate the laying out and working of public roads in this State, in counties having a population of not less than 70,000 and not more than 90,000, under the Federal Census of 1900, or any subsequent Federal Census, and to provide a method for the management and control of county work houses in counties coming under the provisions of this Act.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That in all counties of this State, having a population of not less than 70,000, and not more than 90,000 under the Federal Census of the year 1900, or any subsequent Federal Census, there shall be, and is hereby created a Board of Public Road Commissioners. Said Board shall be composed of three (3) members, citizens of the county to be chosen as hereinafter set out. As soon as this Act shall take effect, the Governor shall appoint three (3) Commissioners, who shall constitute the first Board of Public Road Commissioners, and in appointing said Commissioners the Governor shall designate one of said appointees as Superintendent of Public Roads, and the others as associate members of said Road Commission. The Commissions so appointed by the Governor shall hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election, the candidates to be designated on the official ballot by the titles herein declared. No county officer shall be eligible to a place on the Commission. The duties of said Public Road Commissioners shall be to take charge of and control

all public roads and bridges of the county; to receive from the proper officers, and to disburse funds collected by taxation or otherwise from the repairs or construction of macadam roads, improved highways and bridges. They shall also have control and management of the workhouses in the counties coming under the provision of this Act which have workhouses, provided that al lorders heretofore adopted bv the County Court, and of record relating to the assignment of the workhouse convicts to certain roads shall be complied with by said Board of Public Road Commissioners. They shall have the power to open and close roads as hereinafter provided. The Commissioner who shall be appointed Superintendent of Public Roads, and who shall thereafter be elected to that office, shall receive a salary of fifteen hundred ($1,500.00) dollars a year, and the associate members of said Commission shall receive a salary of three hundred (300.00) dollars a year each, to be paid out monthly of the treasury of the county upon warrant of the County Judge or Chairman. Two members of the Board shall constitute a quorum for the transaction of business. * * *

2399
OFFICE SUPREME COURT of U.
RECEIVED
APR27 1903

# Supreme Court of the United States

## OCTOBER TERM, 1902.

*No. 209.*

STATE OF TENNESSEE *EX REL.* G. L. MALONEY ET AL.

vs.

STEPHEN P. CONDON ET AL.

## ANSWER OF DEFENDANTS IN ERROR TO PETITION TO REHEAR AND REVIVE.

It is stated in the petition to rehear and revive that the question upon which the court's decision dismissing the writ of error in this cause is based was brought to the attention of counsel for petitioners and relators for the first time on the day of the argument of the cause. It is respectfully submitted that for this fact defendants in error are not responsible, the question being one of law arising from the obvious facts of the case. It is further stated in the petition that the brief on behalf of defendants was not filed within the time required by the rules of the court, and did not reach counsel for petitioners in time to admit of reply by

brief. Defendants have no record before them to show when their brief was filed, but rule 21 requires that defendants in error file their briefs with the clerk of this court at least three days before the case is called for hearing, and it is the positive recollection of defendants that their brief was filed more than three days before the hearing. The hearing occurred on the 12th and 13th of March, 1903, and defendants understand and aver that their brief was filed on the 6th of March. However that fact may be, no exception was taken by plaintiffs in error on the hearing or before. Further answering said petition, according to the paragraphs thereof, defendants say:

## I.

That in paragraph one of their petition the plaintiffs ask the court to assume that plaintiffs still hold the offices to which they were elected, as shown in the record, by reason of the fact that chapter 8 of the Acts of 1901 of Tennessee is unconstitutional. There are no facts in the record upon which to base such a claim. All the pleadings were prepared before the expiration of the several terms of office of relators. This court does not know whether or not the county court of Knox county or the people in the case of The County Judge elected the successors of plaintiffs in error at the time when their terms of office expired under the old law. There is no allegation in the pleadings that successors were not elected, and there is no proof to that effect anywhere in the record. The petition to rehear, therefore, is in effect an amended bill which plaintiffs now seek to file in this court. Your honors have said that you will not

assume that relators "would hold over," and this was in response to argument made at the hearing. You are now asked in face of this express declaration in the opinion to assume that they would hold over. The holding of the court on this point was obviously right and must be maintained now, we submit, for want of allegations in the pleadings or proof to show that they do hold over. Attention is called to the fact that it is not alleged in the petition now filed that no successor of any of the relators has been elected, but instead there is a hypothetical allegation that they hold over, which defendants desire to traverse if these pleadings are now to be recast.

## II.

Petitioners insist that this is a public action to be prosecuted by a public prosecutor. Your honors have already held that "in the circumstances this case assumed the aspect of a civil contest between individuals and not of a prerogative writ to correct usurpation of office" (Opinion, p. 4). The nature of this action was discussed at some length in the brief for defendants heretofore filed, and they are content to rely upon the authorities there cited, and more especially upon the holding of the court above referred to.

Plaintiffs likewise seek in paragraph two of their petition to amend their bill by alleging that Stephen P. Condon, who was originally appointed chairman of the road commission of Knox county, was, at the election provided by said act in August, 1902, elected to said office, and has held the same ever since, and is holding the same at this time, and that defendant, H. C. Anderson, is still holding the position of

superintendent of the workhouse of Knox county under and by virtue of appointment under said statute. It is respectfully submitted that this amendment of the bill, like the one above referred to, is inadmissible in this court, as in cases of this kind certainly the jurisdiction of this court is purely appellate, and the cause must be tried upon the record brought to this court by plaintiffs.

Plaintiffs further seek to amend their bill, and, in effect, to bring a new suit by alleging that R. W. Parker and Fletcher Adams were at the August election, 1902, elected members of said road commission in lieu of the defendants McMillan and Rich. Defendants deny the right of plaintiffs to make this amendment of their pleadings, and to bring Messrs. Parker and Adams into this suit as parties defendant under any circumstances, but more especially after the cause has been fully heard and has been determined by your honors. The judgment to be rendered in this cause is, in the language of the supreme court of Tennessee, "exclusion from that office or franchise and the money judgment to be given is for costs."

State *ex rel.* Curry *vs.* Wright, 5 Heiskell, 612.

It would certainly be a unique proceeding, wholly unprecedented, to bring Messrs. Parker and Adams into the cause at this stage of the proceedings, and, in the event of a decree in favor of plaintiffs, to charge said new parties with the costs of this proceeding.

## III.

It is further submitted that there is nothing in this record to show that if said act of 1901 were held unconstitutional the law under which relators were originally elected would again become operative so as to justify the court in deciding that relators hold over.

## IV.

As the allegation in the petition the relators held over necessarily involves the statement that no successor to any one of them has been elected, in the event your honors should give any consideration to this attempted amendment of the pleadings, it is obviously fair that as the question is one of fact the defendants should be allowed an opportunity to plead to the allegation. Defendants do not at this time consider it necessary to make any averments as to the facts of the cause, but they submit that they have a clear right to plead to these new allegations before this court or any other court passes upon them. This court will not render a judgment *pro confesso* against defendants on the amended bill when they are not in default, but are asking as they do now that if these new facts be brought into the record they be allowed to plead to them. They would not, however, have your honors understand that they believe that either plaintiffs or themselves have the right to amend their pleadings in this court, and they respectfully insist that what plaintiffs are now seeking is essentially an amendment of their bill in two respects which plaintiffs seem to consider important.

And now, having fully answered, they pray to be hence dismissed.

CHAS. T. CATES, JR.,
J. W. CALDWELL,
*Solicitors.*

STATE OF TENNESSEE, }
*County of Knox.* }

Personally appeared before the undersigned authority Stephen P. Condon, and made oath in due form of law that the facts stated in the foregoing answer as of knowledge are true and those stated upon information and belief he believes to be true.

STEPHEN P. CONDON.

Sworn to and subscribed before me this April 24, 1903.

[Seal of Jno. F. Edington, Notary Public, Knox Co., Tenn.]

JNO. F. EDINGTON, *N. P.*

# Supreme Court of the United States.

No. 209.—October Term, 1902.

| | |
|---|---|
| The State of Tennessee on the Relation of G. L. Maloney et al., Plaintiffs in Error, *vs.* Stephen P. Condon, T. T. McMillan, James Rich and H. C. Anderson. | In error to the Supreme Court of the State of Tennessee. |

[April 6, 1903.]

This was a bill filed in the Chancery Court of Knox County, Tennessee, under the statute in that behalf, in the name of the State, "on the information of" T. A. Rambo and G. L. Maloney, G. H. Strong, S. L. England, Sam Vance, J. F. C. Harrell and R. L. Peters against Stephen P. Condon, T. T. McMillan and James Rich, and H. C. Anderson, representing "that at the January term, 1898, G. H. Strong and T. A. Rambo were duly and legally elected by the County Court of Knox County, Tennessee, members of the pike commission of Knox County for the term of four years, which would make their terms of office expire in January, 1902, and G. L. Maloney, who is the judge of Knox County, Tennessee, is by operation of the law *ex officio* chairman of said commission. The said Sam Vance and J. F. C. Harrell were duly elected members of the said workhouse commission by the said County Court of Knox County, Tennessee, at its January term, 1901, which would make their terms of office expire in 1903. The said S. L. England and I. N. White were duly elected workhouse commissioners of Knox County, Tennessee, at its January term, 1900, which would make their terms of office expire in 1902, and the said G. L. Maloney as judge of the county is *ex officio* chairman of the said commission. The said R. L. Peters was elected superintendent of the workhouse in January, 1898, which would make his term of office expire in January, 1902. All of said officers were duly and legally elected and inducted into their respective offices and assumed the duties thereof, and up to the time of the qualfication of defendants, to wit, on March 2, 1901, continued to perform the duties and exercise the functions and receive the emoluments pertaining to said offices."

The bill then averred that, on February 8, 1901, an act of the General Assembly of the State of Tennessee was approved by the governor, and went into effect, entitled: "An act to create a board of public road commissioners, to regulate the laying out and working of public roads in this State, in counties having a population of not less than 70,000 and not

more than 90,000, under the Federal census of the year 1900, or any subsequent Federal census, and to provide a method for the management and control of county workhouses in counties coming under the provisions of this act."

That in pursuance of the act, the governor of Tennessee, on February 16, 1901, appointed Stephen P. Condon, James Rich and T. T. McMillan as the board of public road commissioners; that Condon was appointed superintendent of public roads, and the other two associate members of the road commission; that the governor had issued to defendants commissions as such public road commissioners; and that they gave bond and qualified March 2, 1901, "and are now attempting to perform the duties of the said offices."

That defendants had in fact ousted the pike commissioners, the workhouse commissioners and superintendent from their respective positions, and deprived them of their privileges and powers; and that H. C. Anderson had been elected by defendants manager of the workhouse.

Complainants further represented that the act of February 8, 1901, was in plain violation of the constitution of the State of Tennessee; illegal, null and void; and "not effective to deprive the said parties of the several offices aforesaid, to which they were regularly elected, or of the rights, powers, privileges and emoluments thereof," and that defendants "are unlawfully holding and exercising said offices of public road commissioners and superintendent of roads and associate members, and that they are usurpers of said offices."

The prayer was (1) for process; (2) "that the said defendants may be enjoined from holding the said offices of public road commissioners or superintendent of public roads or associate members of said road commission, or manager of the workhouse, or from exercising any of the powers and rights which the said act of February 8, 1901, attempts to confer upon them, and that they may be enjoined from receiving any of the emoluments appertaining to the said offices under and by virtue of the said unconstitutional and void act, and that upon final hearing said injunction may be made perpetual;" (3) that the defendants be required to execute a bond to indemnify and hold harmless; (4) "that upon final hearing a decree may be rendered declaring that the said act of February 8, 1901, is unconstitutional, null and void, and that the same confers no right upon the defendants, and that the defendants are not entitled to exercise any of the powers and privileges therein contained, or to enjoy any of the rights and emoluments therein given to them, and that they be required to surrender same and turn over all the powers, property and privileges thereof to the rightful owners aforesaid;" (5) and for general relief.

On March 21, 1901, an application for injunction was denied, and on March 23d the bill was amended by striking out the third clause of the

prayer. Defendants filed a demurrer March 29, 1901, which, on the next day, was sustained and the bill dismissed. The case was then carried to the Court of Chancery Appeals, and it was there contended, on errors assigned, that the act of February 8, 1901, was invalid because in violation of the Fourteenth Amendment to the Constitution of the United States as well as of the State constitution. The Court of Chancery Appeals affirmed the judgment of the chancellor, August 29, 1901, and an appeal was prosecuted to the Supreme Court of the State, where it was again alleged in the assignment of errors that the act in question was in violation of the State constitution and of the Fourteenth Amendment. The Supreme Court held, on November 15, 1901, that the statute was not in violation of either, and affirmed the decrees of the chancellor and of the Court of Chancery Appeals. 108 Tenn. 82. Thereupon a writ of error was sued out from this court, and the record was filed and the cause docketed December 10, 1901. No motion was made to advance the case, and it came on for argument and was argued March 12 and 13, 1903.

Mr. Chief Justice FULLER delivered the opinion of the Court:

This was a proceeding under provisions of the code of Tennessee authorizing a bill in equity to be filed "whenever any person unlawfully holds or exercises any public office or franchise within this State." Shannon's Tenn. Code, (1896) § 5165, cl. 1; § 5167.

By sections 5169 and 5170 it is provided that the suit may be brought "by the attorney general for the district or county, when directed so to do by the General Assembly, or by the governor and attorney general of the State concurring;" or "on the information of any person, upon such person giving security for the costs;" when the attorney general for the district or county may institute the proceeding without direction. *State* v. *Campbell*, 8 Lea, 74, 75.

Such was this suit, which was not brought by direction of the General Assembly, or of the governor and attorney general of the State; but was instituted at the instance of persons superseded in public office by an act of the General Assembly (approved by the governor and carried into effect by him) which they charged was unconstitutional. Acts 1901, c. 8.

The question of constitutionality had been raised in an application for mandatory injunction to compel the county judge to approve the bonds of the persons appointed commissioners under the act, the writ had been awarded and obeyed, and the decree was affirmed and the act sustained by the Supreme Court at the same time that the decree in this case, subsequently brought, was affirmed. *Condon* v. *Maloney*, 108 Tenn. 82. But the Supreme Court also ruled in the prior case that as the writ had been obeyed, it had spent its force, so that even if they differed with the chancellor as to the use of the particular process, an objection therein urged, a

reversal of his decree "could not undo what what had been done," and to enter it "would be an idle ceremony."

In the circumstances this case assumed the aspect of a civil contest between individuals, and not of a prerogative writ to correct usurpation of office.

Sections 5175, 5176, 5177 and 5180 are as follows:

"5175. Whenever the action is brought against a person for usurping an office, in addition to the other allegations, the name of the person rightfully entitled to the office, with a statement of his right thereto, may be added, and the trial should, if practicable, determine the right of the contesting parties.

"5176. If judgment is rendered in favor of such claimant, the court may order the defendant to deliver to him, upon his qualifying as required by law, all books and papers belonging to the office in his (defendant's) custody, or under his control, and such claimant may thereupon proceed to exercise the functions of the office.

"5177. Such claimant, in this event, may also, at any time within one year thereafter, bring suit against the defendant, and recover the damages he has sustained by reason of the act of the defendant."

"5180. When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs."

In *State ex rel. Curry* v. *Wright*, 5 Heiskell, 612, it was held that the bond given in case of appeal in an action for usurpation of office need be only for costs, and the court, after referring to sections 5176, 5177 and 5180, (by the prior numbers,) said:

"These provisions are specific and clear that the matter in contest to be decided is the usurpation of the office or franchise; and the judgment, exclusion from that office or franchise; and the money judgment to be given is for costs, and the damages, if any have accrued, are provided for in another suit to be brought within a year after the judgment.

"The provision, 'that the suit will be conducted as other suits in equity,' only means that it shall be conducted as such a suit to the attainment of the results above indicated, but cannot be held to include an inquiry into the damages sustained."

The present case was argued March 12 and 13, and it appears on the face of the bill that the terms of office of all the relators, except the county judge, expired before that day. And this was true as to him because we find, by reference to Articles VI and VII of the constitution of Tennessee, and *State* v. *Maloney*, 92 Tenn. 62, that his then term of office as county judge terminated in 1902.

As to the defendants the bill shows that defendant Anderson was merely a subordinate appointee of his co-defendants, and that they had been appointed by the governor commissioners under the act of February 8, 1901. That act provided for the appointment of three commissioners, to "hold their

offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election." The next general election of county officers referred to was held, according to § 1154 of the Code, in August, 1902, So that these commissioners were appointed to serve until that date, and their temporary commissions then terminated.

We cannot assume that relators, who were originally elected by the county court, would hold over, and manifestly the provisional title of defendants has determined. It follows that the relief as prayed cannot now be granted.

There are cases in *quo warranto* in which judgment of ouster has been entered although the term of the person lawfully entitled had expired, and also where informations have been retained, when the statute provided for fine or damages, but here the proceeding cannot now be maintained as on behalf of the public, and considered, as counsel insists it should be, as merely a contest between two sets of officials and not between the State and its officials, the State courts would be at liberty to treat it as abated, and the mere matter of costs cannot be availed of to sustain jurisdiction. See *Boring* v. *Griffith*, 1 Heiskell, 457, 461; *State* v. *McConnell*, 3 Lea, 332; *Williamson County* v. *Perkins*, 39 S. W. Rep. 347; *State* v. *Lindsay*, 103 Tenn. 635.

Doubtless the question of the validity of the act of 1901 is of importance, but it has been upheld by the highest judicial tribunal of the State of Tennessee as consistent with the State constitution, and it affects only the citizens of that State.

If we were to hold that the act could be subjected to the test of the Fourteenth Amendment and that it could not stand that test, we should do nothing more than reverse the decree below and remand the cause, and as such a judgment would be ineffectual, we must decline to intimate any opinion on the subject.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." Mr. Justice Gray, *Mills* v. *Green*, 159 U. S. 651, 653.

We think this writ of error comes within the rule thus declared, and it is therefore

*Dismissed without costs to either party.*